92-533

Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR WRIT OF CERTIORARI

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September 25, 1992

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QUESTIONS PRESENTED

1. Is the Due Process Clause of the Fourteenth Amendment violated by a State statute which arbitrarily "caps" noneconomic damages recoverable in medical malpractice actions without providing the injured party any *quid pro quo* or "reasonably just substitute" for the common law tort remedy displaced?

2. Is the Equal Protection Clause of the Fourteenth Amendment violated by a State statute which discriminates between plaintiffs in medical malpractice actions and plaintiffs in all other common law tort actions or discriminates within the class of medical malpractice plaintiffs by denying recovery to medical malpractice plaintiffs with proven noneconomic damages in excess of a statutory "cap?"

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Missouri are as stated in the caption of the case with the exception of the substitution of Betty Ridgell for Julia Alice Adams. Julia Alice Adams, the mother of the minor child and Plaintiff in her own right, died on May 19, 1992. Pursuant to Missouri procedure, timely Suggestions of Death and Motion for Substitution were filed with the Missouri Court of Appeals, Western District. The Motion For Substitution was sustained by that Court on August 4, 1992.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
SECTION 2403(b) NOTIFICATION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. A CLEAR AND SUBSTANTIAL SPLIT OF AUTHORITY EXISTS AMONG THE STATE AND FEDERAL COURTS ON THE CONSTITUTIONALITY OF STATUTORY "CAPS" ON NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THIS ISSUE IS ONE OF RECURRING NATIONAL SIGNIFICANCE	5
II. THE MISSOURI SUPREME COURT HAS DECIDED SUBSTANTIAL AND IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	15
A. This Court's Fourteenth Amendment Due Process Decisions Provide Substantive Safeguards Applicable To The Arbitrary Limitation of Noneconomic Damages In Medical Malpractice Actions	15

TABLE OF CONTENTS—Continued

Page

1. Due Process Requires A *Quid Pro Quo* Or "Reasonably Just Substitute" For The Displacement Of A Common Law Remedy 16

2. Statutory "Caps" On Noneconomic Damages Recoverable By Medical Malpractice Plaintiffs Are Arbitrary And Capricious In Violation Of Due Process 24

B. This Court's Fourteenth Amendment Equal Protection Decisions Require Invalidation Of A Statutory "Cap" On Noneconomic Damages Applicable Only To Medical Malpractice Plaintiffs Because The State's Discriminatory Treatment Of This Particular Class Of Common Law Tort Plaintiffs Cannot Survive Judicial Scrutiny 26

CONCLUSION 30

APPENDIX A

Opinion of the Supreme Court of Missouri, en banc, in *Adams v. The Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. 1992) 1a

APPENDIX B

Jury Verdict A (February 28, 1991) 20a

APPENDIX C

Judgment Entry in Circuit Court (March 15, 1991) 23a

APPENDIX D

Order Denying Plaintiffs' Motion to Modify Judgment of Trial Court (May 17, 1991) 26a

APPENDIX E

Mo. Rev. Stat., ch. 538 (1986) (Tort Actions Based on Improper Health Care) 28a

TABLE OF AUTHORITIES

CASES: Page

Abie State Bank v. Bryan, 282 U.S. 765 (1931) 9
Adams v. The Children's Mercy Hospital, 832 S.W.2d 898 (Mo. 1992) ..... *passim*
Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) 7, 9, 22, 27
Baptist Hospital of Southwest Texas, Inc. v. Baber, 672 S.W.2d 296 (Tex. App. 1984) 8, 9, 28
Boddie v. Connecticut, 401 U.S. 371 (1971) 18
Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 6, 11, 23, 29
Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) .. 27
Caldwell v. Mississippi, 472 U.S. 320 (1985) 9
Carson v. Maurer, 424 A.2d 825 (N.H. 1980) ..7, 9, 22, 27
Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989) 8, 23, 27
Craig v. Boren, 429 U.S. 190 (1976), *rehearing denied*, 429 U.S. 1124 (1977) 27
Crane v. Hahlo, 258 U.S. 142 (1922) 19
Craton v. Huntzinger, 187 S.W. 48 (Mo. 1916) 15
Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) 6
Detar Hospital, Inc. v. Estrada, 694 S.W.2d 359 (Tex. App. 1985) 8
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) .....*passim*
Duren v. Suburban Community Hospital, 482 N.E.2d 1358 (Ohio C.P. 1985) 8, 29
Etheridge v. Medical Center Hospitals, 376 S.E.2d 525 (Va. 1989) 6,7, 10, 23
Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985) .....*passim*
Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D.Md. 1989) 6
Graley v. Satayathem, 343 N.E.2d 832 (Ohio C.P. 1976) 8, 27
Hampton v. Mow Sun Wong, 426 U.S. 88 1976) 26
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) 19

TABLE OF AUTHORITIES—Continued

Page

Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) ..... *passim*
Hurtado v. California, 110 U.S. 516 (1884) 17
Hyatt v. Hannibal & St. J. R. Co., 19 Mo. App. 287 (Mo. App. 1885) 15
Ingraham v. Wright, 430 U.S. 651 (1977) 16
Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980) 7, 23, 28
Jones v. State Board of Medicine, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) 7, 27
Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) 10, 11, 23
Lalli v. Lalli, 439 U.S. 259 (1978) 27
Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) 10
Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) 6
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 17
McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984) 8
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 26
Michigan v. Long, 463 U.S. 1032 (1983) 9, 10
Missouri Pacific Railway Co. v. Humes, 115 U.S. 512 (1885) 17
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910) 24
Molzof v. United States, 112 S.Ct. 711 (1992) 15
Moore v. Mobile Infirmary Association, 592 So.2d 156 (Ala. 1991) 13
Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) 10
New York v. Class, 475 U.S. 106 (1986) 9
New York Central R. Co. v. White, 243 U.S. 188 (1917) 18, 19, 22, 24
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Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) 17

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	Page
Pfost v. State, 713 P.2d 495 (Mont. 1985), *ovrld on other grnds, Meech v. Millhaven West, Inc.*, 776 P.2d 488 (Mont. 1989)	8, 27
Plyler v. Doe, 457 U.S. 202 (1982)	28
Porter v. Hannibal & St. J. R. Co., 71 Mo. 66 (Mo. 1879)	15
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PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	19
Reed v. Reed, 404 U.S. 71 (1971)	27
Robinson v. Charleston Area Medical Center, Inc., 414 S.E.2d 877 (W.Va. 1991)	10
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Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987)	7
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Stanley v. Illinois, 405 U.S. 645 (1972)	27
Trimble v. Gordon, 430 U.S. 762 (1977)	26
Truax v. Corrigan, 257 U.S. 312 (1921)	17
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Union Pacific R. Co. v. Public Service Commission of Missouri, 248 U.S. 67 (1918)	9
United States v. Stanley, 483 U.S. 669 (1987)	18
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Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986)	7, 28, 29, 30
Washington v. Harper, 494 U.S. 210 (1990)	17

TABLE OF AUTHORITIES—Continued

Page

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STATUTES:

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Colo. Rev. Stat. § 13-21-102.5(3)(a) (1987) 11
Fla. Stat. § 86-160 (1986) 11
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Kan. Stat. Ann. § 60-19(A)-01 (1987) 11
Kan. Stat. Ann. § 60-3407 (1986) 11
La. Rev. Stat. Ann. § 40:1299.39(B) (1976) 12
Mass. Gen. Laws Ann. ch. 231, § 60H (Supp. 1989) 12
Md. Cts. & Jud. Proc. Code Ann. § 11-108 (Supp. 1987) 12
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Mo. Rev. Stat., ch. 538, §§ 538.205-300 (1986) ..... *passim*
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TABLE OF AUTHORITIES—Continued

	Page
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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 Forum 312 (1977) .. 13

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PETITION FOR WRIT OF CERTIORARI

Petitioners Nicole Adams and Betty Ridgell respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINION BELOW

The opinion of the Supreme Court of Missouri, en banc, and the Court's Order denying rehearing are reported at 832 S.W.2d 898 (Mo. 1992), and are reprinted at Appendix A (App. 1a).

JURISDICTION

The decision of the Supreme Court of Missouri was filed on May 19, 1992. A timely motion for rehearing was denied on June 30, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. § 538.210.1:

> 1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant as defendant is defined in subsection 2 of this section.

Mo. Rev. Stat. § 538.210.1 (1986) (Limitation on Noneconomic Damages). "Noneconomic damages" under the statute are defined as:

> [D]amages arising from nonpecuniary harm including, without limitation, pain, suffering, mental an-

> guish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages; . . .

Mo. Rev. Stat. § 538.205(7) (1986) (Definitions). The Missouri Medical Malpractice Act, Chapter 538, is set out in its entirety at Appendix E (App. 28a).

SECTION 2403(b) NOTIFICATION

Pursuant to Rule 29.4(c) of the Rules of the United States Supreme Court, Petitioners recite that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of Missouri is drawn into question and the State of Missouri is not a party.

STATEMENT OF THE CASE

This is a medical malpractice cause of action brought under the law of the State of Missouri. Nicole Adams, eight (8) years old and in excellent health, suffered massive, permanent injuries as a result of negligent medical care she received at The Children's Mercy Hospital in Kansas City, Missouri.

On March 25, 1988, Nicole's mother, Julia Alice Adams, took her to the hospital for treatment of a minor burn she received when Nicole accidently overturned a skillet of frying hamburgers splattering hot grease onto her shoulder. Doctors at the hospital recommended that she undergo a routine, non-emergency skin surgery to speed the healing of this burn.

During this surgery on March 30, 1988, a resident anesthesia physician at the hospital injected a grossly excessive and inappropriate amount of fluid into Nicole's body. The massive fluid overload caused Nicole to suffer a complete cardiac and respiratory arrest such that oxygen flow to her brain was interrupted for a minimum of six (6) minutes, destroying substantial portions of Nicole's brain. She was revived, but as a result of this negligent medical care, Nicole suffers extensive, irreversible brain damage, total blindness, and severe neurological disabilities.

Nicole's life expectancy remains normal and her doctors expect her to survive to over seventy (70) years of age in her present condition. She is unable to dress herself or care for her most basic needs, and requires constant supervision. Whereas before the malpractice Nicole was an exceptionally bright and gifted child, having scored in the top two percent (2%) for reading on her most recent Iowa Basic Test Scores, she now suffers permanent mental retardation.

On February 28, 1991, a state court jury returned its verdict in favor of Plaintiffs Nicole Adams and Julia Alice Adams awarding a total of $20,753,733.00 in compensatory damages:

For Nicole Adams:	
Past Economic Damages	$ 141,379.00
Future Economic Damages	$ 760,042.00
Future Medical Damages	$ 4,947,311.00
Past Non-Economic Damages	$ 3,905,000.00
Future Non-Economic Damages	$10,000,000.00
Total Damages	$19,750,732.00
For Julia Alice Adams:	
Past Non-Economic Damages	$ 250,000.00
Future Non-Economic Damages	$ —0—
Total Damages	$ 250,000.00

(Verdict A, App. B, at 21a-22a).

Pursuant to Mo. Rev. Stat. § 538.210.1, the trial court "capped" Petitioners' noneconomic damages at $430,000.00 multiplied by two (2), the number of separately insured defendants (App. C, at 24a).[1] Application of the "cap-

[1] The statutory "cap" originally was set at $350,000.00 per separately insured defendant. Mo. Rev. Stat. § 538.210(1) (1986). It is adjusted annually in accordance with the implicit price deflator for personal consumption expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. § 538.210(4). At the time of trial, the "cap" was $430,000.00. A "defendant" is defined for purposes of applying the

ping" statute reduced Nicole Adams' noneconomic damages from $13,905,000.00 to $860,000.00, a decrease of $13,045,000.00. Pursuant to the Missouri statute, the trial court entered judgment for $3,082,518.16 (App. C, at 25a).[2]

The federal constitutional questions of Fourteenth Amendment Due Process and Equal Protection sought to be reviewed by this Court were raised at every stage of the proceedings below, both in the court of first instance and in the appellate courts. At the trial level, Petitioners raised these federal constitutional questions both before and subsequent to trial.

Petitioners raised these federal constitutional questions in their Motion to Bar the Enforcement of Any and All Provisions of V.A.M.S. Chapter 538 (Tort Actions Based On Improper Health Care) as Unconstitutional Under the United States and Missouri Constitutions filed prior to trial. Petitioners specifically contended therein that "Chapter 538 and its specific provisions denies Plaintiffs Equal Protection and Due Process of Law under the United States Constitution," expressly citing the Fourteenth Amendment to the United States Constitution. The trial court overruled Petitioners' motion.

Subsequent to trial, Petitioners raised these same federal questions at the trial court level in Plaintiffs' Motion to Modify Judgment of Trial Court or, Alternatively, Motion for New Trial and the trial court overruled that motion. Petitioners raised these federal questions again before the Supreme Court of Missouri. The Supreme Court of Missouri decided these federal constitutional questions adverse to Petitioners.

The federal constitutional questions sought to be reviewed by this Court were timely and properly raised at

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"cap" as all health care providers who are insured under the same professional liability insurance policy. § 538.210.2.

[2] Because defendants opted to assess fault to released parties pursuant to Mo. Rev. Stat. § 538.230. prior settlements totalling $5,505,779.00 were not applicable to the entry of judgment.

every stage of the proceeding so as to accord this Court jurisdiction to review the judgment on Petitioners' Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The sole issue presented here is the constitutionality under the Fourteenth Amendment of a State statute "capping" compensatory, noneconomic damages in all medical malpractice actions. While a number of other statutory provisions were challenged below, Petitioners limit their request for review in this Court to the statutory "capping" issue.[3] This case provides this Court an opportunity to resolve an important constitutional issue dividing the federal and state courts below.

I. A CLEAR AND SUBSTANTIAL SPLIT OF AUTHORITY EXISTS AMONG THE STATE AND FEDERAL COURTS ON THE CONSTITUTIONALITY OF STATUTORY "CAPS" ON NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THIS ISSUE IS ONE OF RECURRING NATIONAL SIGNIFICANCE

The two federal constitutional questions presented by this Petition previously have come to this Court. *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985). In dissenting from the dismissal of the appeal, Justice White noted the unsettled federal Equal Protection question

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[3] Punitive or exemplary damages comprise no aspect of this case. Punitive damages were not sought or alleged at trial and, moreover, "noneconomic damages" under the Missouri Medical Malpractice Act expressly exclude punitive damages. Mo. Rev. Stat. § 538.205(7) (App. E, at 29a).

The other provisions of the Missouri Medical Malpractice Act which were challenged below but are not raised here were § 538.230 (right of medical malpractice defendant to apportion fault to released parties), § 538.230.2 (modification of joint and several liability in favor of medical malpractice defendants), § 538.220 (right of medical malpractice defendants to pay judgments in periodic or installment payments), and § 538.300 (special exception for medical

raised by statutory limits on noneconomic damages in medical malpractice actions. *Id.* at 893. Justice White further pointed out that the Due Process issue raised by damages limits had not been resolved by this Court:

> Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.

474 U.S. at 894-95 (emphasis in original). This split has widened in the seven years since *Fein*.

A clear and substantial split of authority has developed among the state and federal courts as to the constitutionality of statutory "caps" on damages in medical malpractice actions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[4] For example, in

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malpractice judgment debtors immunizing them from "prejudgment interest" rule). *See* App. E. at 32a, *et seq.*

[4] Cases upholding statutory damages "caps" on Fourteenth Amendment Due Process or Equal Protection grounds: *Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989) (State of Virginia's statutory cap on total recovery of damages in medical malpractice actions of $750,000.00 "does not violate the fourteenth amendment's guarantees of due process or equal protection"); *Davis v. Omitowoju*, 883 F.2d 1155, 1158-59 (3d Cir. 1989) (Virgin Islands statute capping medical malpractice verdicts at $250,000.00 for noneconomic damages does not violate Due Process or Equal Protection under Fourteenth Amendment); *Lucas v. United States*, 807 F.2d 414, 421-22 (5th Cir. 1986) (held that Texas statute limiting "nonmedical damages" to $500,000.00 is constitutional under Federal Equal Protection and Due Process, but certified issue to Texas Supreme Court which held statute unconstitutional under Texas Constitution); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (California statute limiting recovery for noneconomic loss to $250,000.00 in medical malpractice suits "does not violate the Equal Protection Clause of the Federal Constitution"); *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325, 1337 (D.Md. 1989) (upholding Maryland statute imposing limitations on noneconomic damages in all personal injury cases rejecting Due Process argument under Fourteenth Amendment); *Etheridge v. Medical Center Hospitals*,

the case at bar, the Supreme Court of Missouri expressly held that the Missouri "capping" statute did not violate

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376 S.E.2d 525, 533-34 (Va. 1989) (limiting total recoverable damages in a medical malpractice action to $750,000.00 does not violate Equal Protection Clause of Fourteenth Amendment to U.S. Constitution); *Fein v. Permanente Medical Group*, 695 P.2d 665, 682-83 (Cal. 1985) ("we know of no principle of California—or federal—constitutional law which prohibits the Legislature from limiting the recovery of damages in a particular setting in order to further a legitimate state interest" finding no federal Due Process or Equal Protection violation), *appeal dismissed*, 474 U.S. 892 (1985); *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149, 158, *opinion modified*, 477 So.2d 1094, 1109-10 (La. 1985) (original decision upheld constitutionality of $500,000.00 limitation on recovery in medical malpractice cases under Equal Protection and Due Process Clauses of Federal Constitution, modified opinion remands case to trial court to receive evidence and argument on constitutionality of statute under Louisiana Constitution); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 598-600 (Ind. 1980) ($500,000.00 limits on malpractice recovery do not offend Due Process or Equal Protection Clauses of Fourteenth Amendment); *Prendergast v. Nelson*, 256 N.W.2d 657, 668 (Neb. 1977) (three-justice plurality agreed that $500,000.00 limit on medical malpractice recovery is "consistent with the dictates of the . . . federal Constitution").

Cases invalidating statutory damages "caps" on Fourteenth Amendment Due Process or Equal Protection grounds: *Waggoner v. Gibson*, 647 F.Supp. 1102, 1106 (N.D. Tex. 1986) (Texas Act imposing recovery limitations of $500,000.00 on medical malpractice victims unconstitutional because it violates Equal Protection Clause of Federal Constitution); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (statute limiting recovery in medical malpractice cases to $300,000.00 violates Equal Protection provision of Fourteenth Amendment to United States Constitution); *Carson v. Maurer*, 424 A.2d 825, 830-31 (N.H. 1980) (limits on malpractice damages violate Equal Protection guarantee of U.S. Constitution, Fourteenth Amendment); *Smith v. Department of Insurance*, 507 So.2d 1080, 1087-88 (Fla. 1987) ($450,000.00 cap on noneconomic damages violates Equal Protection Clause of United States Constitution and Florida's constitutional right of access to courts using federal *quid pro quo* analysis); *Jones v. State Board of Medicine*, 555 P.2d 399, 404-06 (Idaho 1976) (standards applicable to Equal Protection and Due Process challenges under Fourteenth Amendment as developed by United States Supreme Court require higher scrutiny of statutory limits in medical malpractice actions, remanding to district court

the Equal Protection Clause of the Fourteenth Amendment:

> The Adamses' claim that the challenged provisions of Chapter 538 deny them equal protection of the laws as required by the Fourteenth Amendment of the United States Constitution . . . We hold that the

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for factual determination which resulted in damages ceiling being held unconstitutional), *cert. denied*, 431 U.S. 914 (1977), *on remand*, Case Nos. 55527 and 55586 (4th Dist. Idaho, Nov. 3, 1980); *Pfost v. State*, 713 P.2d 495, 501 (Mont. 1985) (statutory "cap" on damages for tort action against State or political subdivision thereof held unconstitutional under Equal Protection provision of State Constitution using "criteria developed in federal cases" adding that result reached under Equal Protection Clause of Fourteenth Amendment of Federal Constitution would be no different), *ovrld on other grnds, Meech v. Millhaven West, Inc.*, 776 P.2d 488 (Mont. 1989); *Duren v. Suburban Community Hospital*, 482 N.E.2d 1358, 1362-63 (Ohio C.P. 1985) (statutory limitation on medical malpractice recovery "violates the protection of . . . Federal Constitution" referring to both Due Process and Equal Protection); *Detar Hospital, Inc. v. Estrada*, 694 S.W.2d 359, 365-66 (Tex.App. 1985) (statutory "cap" in malpractice action violates Equal Protection Clause of federal Constitution); *Baptist Hospital of Southwest Texas, Inc. v. Baber*, 672 S.W.2d 296, 298 (Tex.App. 1984) (violative of federal Equal Protection); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903, 912 (Ohio C.P. 1976) (statutory limitation of $200,000.00 for general damages recoverable in medical malpractice actions violates "Fourteenth Amendment of the Federal Constitution with respect to Equal Protection under the law"); *Graley v. Satayathem*, 343 N.E.2d 832, 838-39 (Ohio C.P. 1976) (provisions of Ohio Malpractice Act violative of United States Constitution, Fourteenth Amendment).

See also McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605, 609, 613 n.10 (Minn. 1984) (damages "cap" of $250,000.00 in Minnesota Dram Shop Act violates Fourteenth Amendment Equal Protection guarantee of United States Constitution); *Condemarin v. University Hospital*, 775 P.2d 348, 363-64 (Utah 1989) (damages cap for medical malpractice as against governmental health care providers violative of Due Process utilizing federal constitutional analysis); *Hoffman v. United States, supra*, at 1433 & n.1 (reversing federal district court's holding that California statute placing "caps" on non-economic damages in malpractice actions "is unconstitutional in that it violates equal protection," although district court did not specify whether holding was based on U.S. or State Constitution, or both).

> provisions of Chapter 538 do not violate equal protection.

832 S.W.2d at 903, 905 (App. A, at 7a, 12a). This finding is in sharp and direct contrast to the decisions of other state and federal courts which have invalidated damages restrictions on Fourteenth Amendment Equal Protection grounds:

> . . . Limitation on recovery in malpractice cases is a violation of the equal-protection provision . . . of the Fourteenth Amendment to the United States Constitution.

Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978).[5]

In his dissent in *Fein v. Permanente Medical Group*, *supra*, Justice White noted that as of that date:

> Four other States which have addressed similar damages limitations have invalidated the challenged provision on federal constitutional grounds.

474 U.S. at 893 (citing to State court decisions from Texas, New Hampshire, North Dakota, and Ohio).[6] In

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[5] *See* note 4 *supra* (cases invalidating statutory damages "caps" under Equal Protection Clause of Fourteenth Amendment).

[6] State court decisions are presumed by this Court to rest on Federal law where the State court opinion makes use of both Federal and State cases in its analysis and the opinion lacks the "plain statement" that it rests on independent and adequate state grounds. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 [1983]); *see also New York v. Class*, 475 U.S. 106, 109-10 (1986). Several state court decisions overturning "capping" statutes have not clearly indicated whether they were relying on Federal or State constitutional grounds, or both. *See, e.g., Carson v. Maurer*, 424 A.2d at 836-38 and *Baptist Hospital of Southeast Texas v. Baber*, 672 S.W.2d at 298, both of which were cited by Justice White in his *Fein* dissent as State cases which invalidated statutory damage limits "on federal constitutional grounds." 474 U.S. at 893.

Of course, for those state court decisions upholding statutory damage limitations, no independent or adequate state constitutional ground could support the judgment if a federal constitutional right is found to have been denied. *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931); *Union Pacific R. Co. v. Public Service Commission*

that nearly all of the decisions on this constitutional issue have addressed similar statutory limits on noneconomic damages in medical malpractice cases, the federal constitutional conflict is clear, unavoidable, and irreconcilable.[7]

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of Missouri, 248 U.S. 67, 70 (1918). *See also Michigan v. Long*, *supra*, at 1068 (Stevens, J., dissenting) ("in reviewing the decisions of State courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard").

Even those State court decisions resting on State constitutional provisions squarely have relied upon and invoked cognate federal Due Process and Equal Protection guarantees established by this Court. *See, e.g., Morris v. Savoy*, 576 N.E.2d 765, 770-71 (Ohio 1991) ($200,000.00 cap on general damages in medical malpractice actions violates Due Process provision of Ohio Constitution following federal analysis); *Robinson v. Charleston Area Medical Center, Inc.*, 414 S.E.2d 877, 882 n.5, 888 (W.Va. 1991) (upholding statutory limits on noneconomic damages under West Virginia Constitution's Equal Protection and Due Process provisions invoking Federal Constitution, Fourteenth Amendment and decisions of this Court); *Samsel v. Wheeler Transport Services, Inc.*, 789 P.2d 541, 555-56 (Kan. 1990) (invoking federal *quid pro quo* analysis); *Lucas v. United States*, 757 S.W.2d 687, 691-92 (Tex. 1988) (limitation of $500,000.00 on recovery against health care providers violates "open courts" provision of Texas Constitution incorporating federal *quid pro quo* analysis); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 257-59 (Kan. 1988) (statutory damage limits in medical malpractice cases violate Kansas constitutional right to a remedy by due course of law invoking U.S. Constitution and federal Due Process analysis, and violate State constitutional right to trial by jury); *Wright v. Central DuPage Hospital Association*, 342 N.E.2d 736, 742-43 (Ill. 1987) (federal *quid pro quo* analysis).

[7] The divisiveness of this issue is further borne out by the fact that in three (3) of the States where no "Patient Compensation Fund" was created, *see* note 21 *infra*, the constitutionality of the "capping" statute was upheld by the narrowest of margins. *Etheridge v. Medical Center Hospital* (Va.), *supra* (4-3 decision); *Fein v. Permanente Medical Group* (Cal.), *supra* (4-3 decision); *Prendergast v. Nelson* (Neb.), *supra* (plurality decision in which only three of seven justices upheld capping provision as constitutional).

In two of the four U.S. Court of Appeals' decisions, the highest court of the State enacting the statute previously had upheld the damages restriction and this factor was given great weight by each

Justice White predicted that:

> Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur.

474 U.S. at 894. That prescient passage foresaw the reality of the continued enactment of State legislation limiting the compensation of medical malpractice victims. This issue is one of recurring national significance in that twenty-four (24) States have enacted statutory limits on damages recoverable in medical malpractice actions.[8]

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court. *Hoffman v. United States* (9th Cir.), *supra*, at 1433-34, 1433 n.2 (California statute); *Boyd v. Bulala* (4th Cir.), *supra*, at 1194 (Virginia statute).

[8] Of the twenty-four state statutes, eighteen deal solely with limitations on recoverable damages in medical malpractice actions, and six apply to all personal injury tort actions. *Alabama*—Ala. Code § 6-5-544(b) (1987) (recovery for noneconomic loss in medical malpractice action shall not exceed $400,000.00); *Alaska*—Alaska Stat. § 09.17.010 (Supp. 1988) (limiting recoverable noneconomic damages in personal injury actions to $500,000.00); *California*—Cal. Civ. Code § 3333.2 (Supp. 1989) (in medical malpractice actions limiting noneconomic damages recovery to $250,000.00); *Colorado*—Colo. Rev. Stat. § 13-21-102.5(3)(a) (1987) (limiting noneconomic damages awards in civil actions to $250,000.00 unless the court finds justification by clear and convincing evidence, an absolute cap of $500,000.00); *Florida*—Fla. Stat. § 86-160 (1986) ($450,000.00 limitation on noneconomic damages applicable to all civil actions); *Idaho*—Idaho Code, Title 39, Chapter 42 (1975) (ceiling on recoverable damages in medical malpractice cases of $150,000.00 per claim and $300,000.00 per occurrence or amount of $10,000.00 multiplied by total number of beds in hospital); *Illinois*—Ill. Rev. Stat. Ch. 70 (1975) (maximum recovery in medical malpractice cases set at $500,000.00); *Indiana*—Ind. Code Ann. § 16-9.5-2-2 (Burns Supp. 1989) (limiting total amount recoverable in a medical malpractice action to a maximum of $750,000.00 and providing for a patient compensation fund); *Kansas*—Kan. Stat. Ann. § 60-3407 (1986) which limited recoverable noneconomic damages in medical malpractice actions to $250,000.00 and total recovery to $1,000,000.00 was struck down by the Kansas Supreme Court in *Kansas Malpractice Victims Coalition v. Bell*, 257 P.2d 251, 269 (Kan. 1988); however, Kan. Stat. Ann. § 60-19(A)-01 (1987) limiting noneconomic damages to $250,000.00 in all personal injury actions

This issue affects many lives. Based upon the population of those States in which "capping" legislation has

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except medical malpractice was upheld by the Kansas Supreme Court in *Samsel v. Wheeler Trans. Serv., Inc.*, 789 P.2d 541 (Kan. 1990); *Louisiana*—La. Rev. Stat. Ann. § 40:1299.39(B) (limiting total amount recoverable in medical malpractice action to $500,000.00, later amended to apply to noneconomic damages only); *Maryland*—Md. Cts. & Jud. Proc. Code Ann. § 11-108 (Supp. 1987) (limiting recovery for noneconomic damages to $350,000.00); *Massachusetts*—Mass. Gen. Laws Ann. ch. 231, § 60H (Supp. 1989) (limiting noneconomic damages in medical malpractice actions to $500,000.00 unless the jury finds special circumstances); *Michigan*—Mich. Comp. Laws Ann. § 600.1483 (Supp. 1989) (limiting noneconomic damages in medical malpractice cases to $225,000.00 except in specified circumstances); *Minnesota*—Minn. Stat. Ann. § 549.23 (Supp. 1988) (limiting intangible losses, excluding pain, disability, or disfigurement, to $400,000.00 in all civil actions); *Missouri*—Mo. Rev. Stat. § 538.210 (1986) (in medical malpractice actions, limiting recovery for noneconomic damages to $350,000.00); *Nebraska*—Neb. Rev. Stat. § 44.2825 (1988) (limiting recovery for all damages in medical malpractice cases to a maximum of $1,000,000.00 from the health care provider and a statutory liability fund); *New Hampshire*—N.H. Rev. Stat. Ann. Chapter 507-C (Supp. 1979) (limits awards in medical malpractice actions to $250,000.00 for noneconomic loss); *North Dakota*—N.D. Cent. Code, Chapter 26-40.1 (1977) (limits liability of health care provider to $300,000.00 per occurrence); *Ohio*—Ohio Rev. Code Ann. § 2307.43 (setting $200,000.00 cap on general damages in medical malpractice lawsuits); *Texas*—Tex. Rev. Civ. Stat. Ann., Art. 4590i (1986) (established "cap" of $500,000.00 on recovery of damages by plaintiffs in medical malpractice suits); *Utah*—Utah Code Ann. § 78-14-7.1 (Supp. 1986) (limiting recovery against health care providers for noneconomic damages to $250,000.00); *Virginia*—Va. Code § 8.01-581.15 (1976) (limiting total amount recoverable in action against health care provider to $750,000.00); *Washington*—Wash. Rev. Code Ann. Ch. 4.56.250 (1986) (application of formula limits noneconomic damages using average annual wage and life expectancy); *West Virginia*—W.Va. Code § 55-7B-8 (1987) ($1 million "cap" for noneconomic loss in medical professional liability action against health care provider).

To date eleven of the twenty-four State statutes have been declared unconstitutional by the highest court of that State. Five State supreme courts have invalidated "capping" statutes on Fourteenth Amendment Due Process or Equal Protection grounds. *See* note 4 *supra*. Four State supreme courts have overturned the

been unchallenged or upheld, more than thirty percent (30%) of the entire U.S. population is currently subject to some form of "caps" on damages, primarily in malpractice actions.[9] The question of whether statutory "caps" on damages are permissible under the federal Constitution has now percolated sufficiently in the state and federal courts below rendering it ripe for decision in this Court.[10] The passage of time or further litigation in

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statutes on State equal protection, due process, or "open courts" provisions using federal constitutional analysis. *See* note 6 *supra*. Two others have invalidated damages limits on State constitutional right to jury trial grounds. *Moore v. Mobile Infirmary Association*, 592 So.2d 156, 171 (Ala. 1991) (statute limiting damages for noneconomic loss to $400,000.00 in medical malpractice cases violates Alabama Constitution's right to trial by jury); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 712-13 (Wash. 1989) (cap on noneconomic damages violates right to trial by jury of Washington Constitution).

[9] 1990 Census of Population and Housing, U.S. Department of Commerce, Bureau of the Census (March 1992).

[10] Legal commentary upon this issue has been extensive. *See, e.g.*, Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 Tex. L. Rev. 759 (1977); Note, *Medical Malpractice Damage Caps: Navigating the Safe Harbors*, 65 Wash. U.L.Q. 565 (1987); Note, *Constitutional Law—Tort Reform—Judicial Responses to Damage Cap Legislation and Their Potential Influence on the Alabama Tort Reform Package*, 18 Cumb. L. Rev. 759 (1988); Comment, *Caps, "Crisis," and Constitutionality—Evaluating The 1986 Kansas Medical Malpractice Legislation*, 35 Kan. L. Rev. 763 (1987); Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 196 (1985); Harpter, *Which Equal Protection Standard for Medical Malpractice Legislation?*, 8 Hastings Const. L.Q. 125 (1980); Hirsh, *Medical Crisis of the 80's Part III—Professional Liability Tort Reform, Legal Aspects of Medical Practice*, December 1985; Seiden, *The Malpractice Muddle*, Commonweal, January 17, 1986, at 8; *Medical Malpractice: Will Jumbo Awards Spark Another Insurance Crisis?*, 68 ABA J. 1545 (1982); Blaut, *The Medical Malpractice Crisis—Its Causes and Future*, 44 Ins. Counsel J. 114 (1977); Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 Ins. L.J. 90 (1976); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 Tex. Tech. L. Rev. 419 (1979); White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 Forum 312 (1977); Reidinger, *The Doctor Is In: Courts Limit*

the lower federal courts or in the state courts cannot resolve or clarify this federal constitutional issue. The facts and circumstances of this case render it an ideal vehicle for this Court's resolution of an extremely important and worthy constitutional question.

Malpractice Liability, ABA J. (November 1989) at 112; Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 Md. L. Rev. 489 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 Duke L.J. 1417; Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 Tul. L. Rev. 655 (1976); Comment, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Counter-suits*, 34 Wash. & Lee L. Rev. 1179 (1977); Comment, *Statutes Limiting Medical Malpractice Damages*, 32 Fed'n Ins. Couns. Q. 247 (1982); Comment, *Medical Malpractice: A Sojourn Through the Jurisprudence Addressing Limitation of Liability*, 30 Loy. L. Rev. 119 (1984); Note, *Fein v. Permanente Medical Group: Future Trends and Damage Limitation Adjudication*, 80 Nw. U. L. Rev. 1643 (1987); Note, *The Constitutionality of Medical Malpractice Legislative Reform: A National Survey*, 18 Loy. U. Chi. L.J. 1053 (1987); Qual, *A Survey of Medical Malpractice Tort Reform*, 12 Wm. Mitchell L. Rev. 417 (1986); Note, *Legislative Limitations on Medical Malpractice Damages: The Chances of Survival*, 37 Mercer L. Rev. 1583, 1603 (1986); Note, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 Okla. City L. Rev. 135 (1988); Comment, *Medical Malpractice: Constitutional Implications of a Cap on Damages*, 7 N. Ill. U. L. Rev. 61 (1986); Note, *Medical Malpractice—$250,000 Cap on Pain and Suffering, Cal. Civ. Code § 33.2—Does The Statute Meet Its Constitutional Burden and Legislative Goals?*, 8 Whittier L. Rev. 601 (1986); Commentary, *Medical Malpractice: The Second Wave of "Reform,"* 37 Ala. L. Rev. 419 (1986); Martin, *Limiting Damages for Pain and Suffering*, 10 Am. J. Trial Adv. 317 (1986); Note, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right*, Case West. Res. L. Rev. 40:825 (1989-90).

II. THE MISSOURI SUPREME COURT HAS DECIDED SUBSTANTIAL AND IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. This Court's Fourteenth Amendment Due Process Decisions Provide Substantive Safeguards Applicable To The Arbitrary Limitation of Noneconomic Damages In Medical Malpractice Actions

The Missouri statute approved by the Supreme Court of Missouri eliminates the historic common law right of severely injured medical malpractice victims to recover noneconomic compensation over and above the statutory, pre-set "cap." No such damages "cap" exists for any other type of common law tort action. Missouri common law had long recognized the right of an injured person in a tort action to recover fair and just compensation for noneconomic damage—disability, pain and suffering, loss of enjoyment of life,[11] disfigurement—subject to judicial safeguards for excessive verdicts such as remittitur or new trial. *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66, 81-82 (Mo. 1879); *Hyatt v. Hannibal & St. J. R. Co.*, 19 Mo.App. 287, 293 (Mo.App. 1885) ("Mental pain and suffering is recognized as an element of damage in nearly every state in the Union, and in none more clearly than in Missouri").[12]

Similarly, Missouri law has long provided for "full compensation" in a personal injury action in tort regardless of what the defendant can or should pay, *Craton v.*

[11] This Court recently confirmed that common law compensatory damages include "loss of enjoyment of life." *Molzof v. United States*, 112 S.Ct. 711, 717-18 (1992).

[12] *See also Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 24 S.W. 472 (Mo. 1893), where the Supreme Court of Missouri held that when a boy nine (9) years of age was injured so as to render him a "cripple for life," it was proper to compensate him for mental suffering arising from his conscious knowledge of that fact. *Id.* at 477-78.

Huntzinger, 187 S.W. 48, 52-53 (Mo. 1916), and has followed the common law rule that compensatory damages must be based on facts specifically relating to the particular injuries. *Wilson v. Davis*, 280 S.W. 44, 45 (Mo. 1925), *cert. denied*, 273 U.S. 776 (1927).

As is clear by the Missouri statutory definitions of "economic" and "medical" damages under the Malpractice Act, Mo. Rev. Stat. § 538.205(1)(6), these only provide compensation for products and services specifically needed because of the injuries and to replace income lost because of the inability of the injured party to work due to these injuries. Economic loss alone does not and cannot fully compensate an injured person. When one has suffered an injury which will produce life-long quadriplegia, blindness, severe mental retardation, or loss of limb, it is the function of noneconomic damages to compensate a human being for that loss in society's best effort to make that person whole.[13]

1. *Due Process Requires A* Quid Pro Quo *Or "Reasonably Just Substitute" For The Displacement Of A Common Law Remedy*

This Court has pointed out that Fourteenth Amendment Due Process historically has protected a liberty interest in one's personal security:

> Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal liberty.

Ingraham v. Wright, 430 U.S. 651, 673 (1977) (citing to 1 W. Blackstone's Commentaries at 134 and to the 39th Article of the Magna Carta which provided that "an individual could not be deprived of this right of personal security 'except by the legal judgment of his peers or by the law of the land' ").[14]

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[13] "[F]or a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic damages." *Fein v. Permanente Medical Group*, 695 P.2d at 689-90 (Bird, C.J., dissenting).

[14] Justice Stevens has stated that Fourteenth Amendment liberty interests "are both physical and intellectual. Every violation of a

State abolition of a historic common law damages remedy implicates a protected Fourteenth Amendment interest.[15] Indeed, access to State courts by private citi-

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person's bodily integrity is an invasion of his or her liberty." *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part).

[15] In discussing the requirements of Due Process under the Fourteenth Amendment, this Court concluded over a century ago that:

> It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; . . .

Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 521 (1885). *See also Truax v. Corrigan*, 257 U.S. 312 (1921), where this Court articulated the common law protections inherent in Fourteenth Amendment Due Process:

> The Due Process Clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

Id. at 332 (citing *Hurtado v. California*, 110 U.S. 516, 535 [1884]).

This Court has emphasized that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional rights . . ." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 693 (1980). Full and just compensation for injuries dates back to the Magna Carta and was incorporated into Lord Coke's writings in the Second Institute of 1671. According to Lord Coke:

> Every Subject . . . for injury done to him in *bonis, terris, vel persona*, by any other Subject . . . may take his remedy by the Law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

Coke, 2nd Institute, 55-56 (4th ed. 1671). In one of this Court's most famous decisions, Chief Justice Marshall emphasized the critical responsibility of government to afford a remedy when a right has been violated:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63 (1803).

zens for resolution of disputes governed by Fourteenth Amendment Due Process.[16] State legislatures are undoubtedly free to alter various substantive and procedural aspects of their tort system, and Petitioners do not advance any notion of "federal tort law;" but the statutory elimination of a compensatory damages remedy so fundamentally impacts upon the common law rights of private litigants as to raise powerful Federal Due Process concerns.[17]

This Court has strongly suggested that Due Process requires a *quid pro quo* or "reasonably just substitute" for the statutory displacement of a common law remedy for injury. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 92-93 (1978); *New York*

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[16] *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (constitutional right of access to the courts applicable to the States through the Fourteenth Amendment). Due Process protection extends to plaintiffs affirmatively seeking access to the courts and they are entitled to at least as much Due Process as defendants who are compelled into court. *Id.* at 381.

This Court has justified the State's monopoly over the court system by imposing the constitutional requirement that the States "must function strictly within these bounds" of Due Process of law:

> Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Boddie, 401 U.S. at 375.

[17] *See United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part):

> If this principle [of the Nuremberg Military Tribunals] is violated the very least that society can do is to see that the victims are compensated, as best as they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much.

Central R. Co. v. White, 243 U.S. 188, 201 (1917).[18] Despite these Due Process decisions of this Court, the State of Missouri has deprived the most severely injured medical malpractice plaintiffs of their historic common law right to full and fair compensation and has provided them nothing in return.

The genesis of *quid pro quo* constitutional analysis was this Court's 1917 decision in *New York Central R. Co. v. White*, *supra*. Therein, this Court reviewed the constitutionality of a state workers' compensation law and found that the benefits conferred by the statute created a "reasonably just substitute" for the common law remedies it displaced:

> Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guarantee of "due process of law," suddenly set aside all common-law rules respecting liability between employer and employee without providing a reasonably just substitute . . . [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.

243 U.S. at 201.

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[18] *See also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, . . ., at least without a compelling showing of necessity or a provision for a reasonable alternative remedy") (citing *Duke Power* and *New York Central R. Co.*).

See also Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158-59 (1931) (held that a State is free to choose among various forms of remedy "provided its choice is not unreasonable or arbitrary" and Due Process requirements of Fourteenth Amendment "are satisfied if the substitute remedy is substantial and efficient"); *Crane v. Hahlo*, 258 U.S. 142, 147 (1922) (legislature may alter or change a remedy "so long as a substantial and efficient remedy remains . . .") (citing *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 439 [1903]).

This Court pointed out that the "statute under consideration sets aside one body of rules only to establish another system in its place." *Id.* at 201. This Court ruled that the New York Act must be "judged in its entirety" and proceeded with an extensive discussion as to whether the method of compensation provided by the Act was a substitute scheme which "transcends the limits of permissible state action." *Id.* Significantly, however, the amount of compensation statutorily provided was not raised and to this point this Court stated:

> This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. . . . Any question of that kind may be met when it arises.

243 U.S. at 205-06. This precise question now arises before this Court given the "onerous" limitation on damages imposed by the Missouri "capping" statute and the Missouri Supreme Court's rejection of Petitioners' argument that the statute deprives them of due process of law under the Fourteenth Amendment.

More recently, this Court utilized this identical *quid pro quo* analysis in *Duke Power Co. v. Carolina Environmental Study Group, supra.* This Court evaluated the Price-Anderson Act which put a $560 million ceiling on liability in nuclear power plant accidents in exchange for the imposition of strict liability and an expedited recovery scheme. 438 U.S. at 69. This Court upheld the Act under Due Process challenge emphasizing the creation of a substitute compensation scheme created by Congress. *Id.* at 92-93. This Court found advantageous to plaintiffs the Act's "waiver of defenses" which effectively would entitle "injured parties to compensation without proof of fault . . ." *Id.* at 91.

This Court heavily stressed the non-arbitrariness of the particular $560 million "cap" arrived at by both expert appraisal of the risk of nuclear incident and the Congress' explicit commitment that the "caps" were a "starting point" and that additional relief would be assured. *Id.* at 86-87. In that regard, this Court concluded

that the particular damages ceiling provided for was within permissible Due Process limits. *Id.* at 87.

In addition to the arbitrary nature of the damages ceiling, the Petitioners contended that the Act failed "to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates." *Id.* at 87-88. In view of the alternative compensation scheme provided for by the Act, this issue was not reached:

> However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

438 U.S. at 88. This Court also viewed favorably the Act's provision of "immediate assistance" payments and the elimination of expenses and time-consuming litigation on liability. *Id.* at 91-92. This Court found that the Act guaranteed a level of compensation "generally exceeding that recoverable in private litigation" and again stressed the "explicit Congressional commitment" to take additional action over and above the $560 million ceiling. *Id.* at 93. In language strongly suggesting the requirement of a *quid pro quo*, this Court concluded upon its review of the Price-Anderson Act:

> This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

438 U.S. at 93.

Not a single one of the factors relied upon by this Court in upholding the constitutionality of the damages ceiling in *Duke Power* is present in the Missouri statutory scheme imposing mandatory "caps" on malpractice damages. Furthermore, this Court analyzed the constitutionality of the Act in view of Congress' overriding objective to encourage private development of nuclear reactors. 438 U.S. at 83-84. No correlative objective is remotely applicable respecting health care in that hospitals and physi-

cians have exceedingly high economic incentives to enter and remain in the health care field.[19]

The legislative schemes upheld by this Court in *New York Central R. Co.* and *Duke Power* as against Due Process attack were entirely different from the challenged Missouri statute in that specific and measurable benefits were conferred upon those persons whose common law remedies were severely restricted or abolished. No benefit whatsoever is bestowed upon malpractice victims such as Nicole Adams by the Missouri "capping" statute. The Missouri Medical Malpractice Act offers no waiver of defenses, expediency of resolution, or guaranteed compensation fund as per the Acts under review in *New York Central R. Co.* and *Duke Power*, but instead retains and even amplifies all of the pre-existing proof and liability burdens upon injured plaintiffs (App. E, at 28a). This Court never has upheld the statutory elimination of a damages remedy for a historic common law tort action without any measure of benefit in return.

As Justice White noted in his dissent in *Fein v. Permanente Medical Group*:

> One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* . . .

474 U.S. at 894 (citation omitted). Many State supreme courts have utilized this Court's *quid pro quo* analysis as a basis for invalidating statutory damage "caps" in medical malpractice cases.[20] Use of a *quid pro quo* analysis

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[19] *See* Owens, Earnings Survey, *Medical Economics*, September 4, 1989, at 147.

[20] *Arneson v. Olson*, 270 N.W.2d at 134-35; *Lucas v. United States*, 757 S.W.2d at 690 ("our first concern with the statute is that the legislature has failed to provide Lucas any *adequate substitute* to obtain redress for his injuries"); *Carson v. Maurer*, 424 A.2d at 837-38; *Wright v. Central DuPage Hospital Assoc.*, 347 N.E.2d at 738-39 ("defendants argue that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower

provided the justification for two (2) State supreme courts to uphold the constitutionality of their respective medical malpractice damages limitations statutes.[21]

In upholding damages "caps" in malpractice actions, many lower federal courts and state supreme courts have interpreted this Court's *Duke Power* decision as dismissing any constitutional Due Process objections to legislative limits on damage recoveries.[22] Nowhere did this

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medical care costs for all recipients of medical care.' This *quid pro quo* does not extend to the seriously injured medical malpractice victim . . ."); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d at 260 ("when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it"); *Condemarin v. University Hospital*, 775 P.2d at 361 ("determinative question is therefore whether the recovery cap can be regarded as a reasonable, nonarbitrary limitation on the right to recover for tortious injuries in a context where a common law right to recovery has been restricted"); *see generally* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 Harv. J. Legis. 143, 180-83 (1981).

[21] *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d at 601; *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d at 156. Both the Indiana and Louisiana schemes involved the creation of a Patient Compensation Fund and this was given great emphasis by each court in upholding the constitutionality of the statute. *Johnson v. St. Vincent Hospital, supra*, at 601 ("[t]he [Indiana] legislature responded by creating the Patient Compensation Fund"); *Sibley v. Board of Supervisors of Louisiana State University, supra*, at 156.

[22] *See, e.g., Hoffman v. United States* (9th Cir.), 767 F.2d at 1435-36 (citing *Duke Power* for proposition that Supreme Court has sustained tort liability limitation); *Boyd v. Bulala* (4th Cir.), 877 F.2d at 1197 n.6 (rejecting as "unsound" plaintiff's argument that damages caps implicate Due Process Clause because they abolish a common law remedy without providing a reasonably just substitute, citing *Duke Power* where "Supreme Court declined an opportunity to establish the *quid pro quo* requirement"); *Etheridge v. Medical Center Hospitals* (Va.), 376 S.E.2d at 532 (citing *Duke Power* for proposition that "legislature has the power to provide, modify, or repeal a remedy"); *Fein v. Permanente Medical Group* (Cal.), 695 P.2d at 682 (citing *Duke Power Co.* for proposition that no federal constitutional law prohibits the legislature from

Court sanction the use of damage limitations under Due Process without evaluating the total statutory replacement scheme, the remedies otherwise available, and the specific impact on the affected parties. *Duke Power*, 438 U.S. at 90-93; *New York Central R. Co. v. White*, 243 U.S. at 201-03. This Court could not have been any clearer that it was expressly reserving this issue for another day wherein it concluded that "we did not resolve this question" because the Act "provided a reasonably just substitute." *Duke Power*, 438 U.S. at 88.

It is appropriate and timely for this Court to take up this question specifically left unresolved fourteen (14) years ago in *Duke Power* and which germinated seventy-five (75) years ago in *New York Central*. Courts, legislatures, and litigants across the country urgently require this Court to clarify the role, if any, that *quid pro quo* analysis plays in federal Due Process.

2. *Statutory "Caps" On Noneconomic Damages Recoverable By Medical Malpractice Plaintiffs Are Arbitrary And Capricious In Violation Of Due Process*

This Court has long held that state legislation is violative of substantive Due Process where it is arbitrary, capricious or irrational. *Williamson v. Lee Optical Co. of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955); *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937); *Mobile*,

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limiting the recovery of damages); *Franklin v. Mazda Motor Corp.* (D.Md.), 704 F.Supp. at 1331-32 (same); *Lucas v. United States* (5th Cir.), 807 F.2d at 422 (concluding that "dicta" in *Duke Power* "answers this case" such that "there is no Due Process violation in the application of this [damages capping] statute to plaintiffs such as Lucas under the federal Constitution"); *Jones v. State Board of Medicine* (Idaho), 555 P.2d at 409 ("idea that Due Process imposes a *quid pro quo* requirement seems to have resulted from dictum in *New York Central R. Co. v. White*, . . . however, it appears to have been nothing more than a make-weight argument"). *But see Waggoner v. Gibson* (N.D. Tex), 647 F.Supp. at 1106 ("Due Process may require that a legislatively enacted compensation scheme provide a reasonably substitute remedy for displacing a remedy at common law").

J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910). In this instance, the State arbitrarily has chosen to impose the burdens of malpractice upon the most severely injured patients and to leave them without the measure of compensation as would be permitted in every other tort action. Any number of alternatives exist for the State to intervene to accomplish its purpose such as regulation and administration of insurance rates, enhanced education and quality control of health care providers, or regulation of health care expenses.

The arbitrariness of the Missouri statutory limitation on damages is readily apparent when the amount of compensation for noneconomic loss would depend to a far greater extent upon the number of malpractitioners[23] rather than upon the seriousness of the injury or whether the type of loss is one compensable in economic terms.[24] The effect of the "cap" is to act as a legislative pre-set involuntary remittitur. If a State may arbitrarily cap noneconomic recovery at some pre-set figure, there is no basis for denying it the capacity to cap recovery at any dollar figure or even to totally abolish that remedy altogether.

The automatic and inflexible nature of the statutory damages limitation fails to take into account any case specific evaluation or to provide for any exceptions or departures. The original $350,000.00 "cap" defies rational explanation in terms of the nature and extent, duration, and disabling feature of injuries suffered by

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[23] *See* note 1 *supra*. The damages "cap" is multiplied by the number of separately insured defendants. Mo. Rev. Stat. § 538.210.2 ("Defendant" defined).

[24] For example, an arm or leg may be replaced for many years, albeit incompletely, by expensive electronic prostheses. Yet medical technology has no comparable replacement for the severely brain-damaged person and, hence, the only compensatory measure of that loss would be in the form of noneconomic rather than economic recovery. It is the unique function of noneconomic loss to replace that which is irreplaceable and to restore in kind that which was taken away.

badly victimized malpractice plaintiffs, such as Petitioner Nicole Adams.

B. This Court's Fourteenth Amendment Equal Protection Decisions Require Invalidation Of A Statutory "Cap" On Noneconomic Damages Applicable Only To Medical Malpractice Plaintiffs Because the State's Discriminatory Treatment Of This Particular Class Of Common Law Tort Plaintiffs Cannot Survive Judicial Scrutiny

The Missouri statute "capping" recoveries to malpractice plaintiffs imposes grossly discriminatory treatment on one particular class of tort victims, those severely injured by negligent medical practitioners. The statute also creates a discriminatory sub-class of persons within the class of medical malpractice victims whose noneconomic damages are fairly and reasonably found by a jury after judicial review to be in excess of the statutory "cap." The State of Missouri has created a dramatic and arbitrary distinction in the quality of justice which victims of medical malpractice may receive compared with victims of any other actionable common law negligence, in sharp violation of numerous decisions of this Court forbidding States from denying to persons within their jurisdiction the equal protection of the laws.

This Court on occasion has applied an elevated form of scrutiny for justification of certain legislation. This Court carefully has scrutinized certain statutes applicable either to particular rights or classes, by evaluating whether a "substantial relationship" exists between the means and ends of the statutory classification scheme.[25]

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[25] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-63 (1974) ("compelling state interest" and "heavy burden of justification" on durational residency requirement for non-emergency medical care); *Turner v. Dept. of Employment Security of Utah*, 423 U.S. 44, 45-46 (1975) (unemployment compensation); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (food stamps); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (illegitimate children); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-05 (1976) (aliens); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645-46

This Court never has considered the federal constitutional question of whether right of access to the courts to seek private redress for tortious bodily harm is a "fundamental" or "quasi-fundamental" right or whether severely injured medical malpractice plaintiffs comprise a "suspect" or "semi-suspect" class so as to trigger a greater level of scrutiny than mere rational relationship.

Many lower courts have utilized a more searching scrutiny of statutory restrictions on malpractice recoveries, concluding that the statute denied equal protection of the laws.[26] Many other courts, including the Supreme Court of Missouri in the case at bar, have declined to do so.[27] Whether a statutory limitation on damages appli-

(1975) (women); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (unwed fathers); *see also Lalli v. Lalli*, 439 U.S. 259, 269 (1978); *Craig v. Boren*, 429 U.S. 190, 240 (1976), *rehearing denied*, 429 U.S. 1124 (1977); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

[26] *Condemarin v. University Hospital*, 775 P.2d at 356 (applying "heightened standard of review under equal protection"); *Brannigan v. Usitalo*, 587 A.2d 1232, 1234 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d at 133-34; *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d at 911-12; *Graley v. Satayathem*, 343 N.E.2d at 838-39; *Pfost v. State*, 713 P.2d at 501-02; *Jones v. State Board of Medicine*, 555 P.2d at 411-12. According to the Ohio court in *Graley v. Satayathem*, *supra*:

> There obviously is "no compelling governmental interest" unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence.

343 N.E.2d at 837. In noting that the right to recover for personal injuries was "an important substantive right," the Supreme Court of New Hampshire applied the "fair and substantial relationship" test in invalidating the medical malpractice statute under review:

> We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.

Carson v. Maurer, 424 A.2d at 830.

[27] The Missouri Supreme Court refused to apply any higher standard of scrutiny to the damages "cap" other than the rational relationship test which it agreed was "minimal in nature." 832 S.W.2d at 903 (App. A, at 8a). *See Hoffman v. United States*, 767 F.2d at 1436 ("Finding that [statutory cap] does not involve any suspect

cable to one particular type of common law tort action warrants higher scrutiny is a question deserving of attention by this Court.

Even without a more rigorous and searching scrutiny of the challenged statute on Equal Protection grounds, the rational relationship test is not toothless. This Court's holdings have many times confirmed that a State is not constitutionally permitted to create a classification of persons whose relationship to the asserted legislative goal is "so attenuated as to render the distinction arbitrary or irrational." *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973).

The "rational relationship" test requires the court to assess whether any legitimate state interest is promoted by the classification scheme created by the statute. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972). When reviewed in terms of the objectives sought, a number of courts have held that singling out the class of persons most catastrophically injured and disabled by health care providers for disparate treatment has no reasonable or legitimate relationship to the state interest of reducing malpractice insurance costs or increasing the availability of health care.[28]

Applying only the rational relationship test, these courts have determined that a legislative act which "caps" damages is an unconstitutional denial of Equal Protection.

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or quasi-suspect classification, a fundamental right, or a classification requiring a heightened scrutiny, we conclude that the proper level of scrutiny is the rational basis test"); *Prendergast v. Nelson*, 256 N.W.2d at 669; *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E. 2d at 597; *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d at 156-57.

[28] *Waggoner v. Gibson*, 647 F.Supp. at 1106 ("stricter standards of review are not appropriate" but invalidating statute under "rational relationship" test); *Baptist Hospital of Southeast Texas, Inc. v. Baber*, 672 S.W.2d at 298 (finding violation of Equal Protection using "rational basis test"); *Wright v. Central DuPage Hospital Association*, 347 N.E.2d at 741-42.

According to the reasoning of these courts, the fact that physicians and hospitals would have to pay higher premiums for liability coverage is not a legitimate basis to deny the full measure of compensation to the persons they injure.[29] They argue that the interest of the State in protecting the income of physicians is not a legitimate goal when to do so results in a measure which is not shared equally among consumers of health care, but to be borne entirely by those consumers who receive bad health care.[30]

No basis ever exists for compromising firmly entrenched constitutional protections.[31] This Court has firmly established that constitutional protections exist "in good and bad times." *Youngstown Sheet & Tube Co. v. Sawyer*, 343

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[29] *Waggoner v. Gibson*, 647 F.Supp. at 1106-07; *Duren v. Suburban Community Hospital*, 482 N.E.2d at 1362-63 ("Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceivable, but shocking to this Court's conscience").

[30] *But see Boyd v. Bulala*, 877 F.2d at 1197 ("cap on liability bears a reasonable relation to a valid legislative purpose").

[31] A number of reports and studies have determined that the alleged malpractice "crisis" had no relationship whatsoever with the function of the tort system, and was attributable entirely to market conditions and mismanagement of risk and funds by the insurance carriers themselves. *See, e.g.*, Sepler, *Professional Malpractice Litigation Crises: Danger or Distortion?*, 15 Forum 493 (1980); Kindregin and Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 St. Mary's L.J. 673 (1987); Aitken, *Medical Malpractice: The Alleged "Crisis" In Perspective*, 637 Ins. L.J. 90, 96 (1976); Oster, *Medical Malpractice Insurance*, 45 Ins. Counsel J. 228, 231 (1978); General Accounting Office, *Medical Malpractice: A Framework for Action*, 32 (1987); Crane, *Does Your Malpractice Insurer Owe You A Refund?*, *Medical Economics*, October 16, 1989, at 60; Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonzaga L. Rev. 15 (1986); Schroater & Rutzick, *"Tort Reform": Being an Insurance Company Means Never Having to Say You're Sorry*, 22 Gonzaga L. Rev. 31 (1987); *The Manufactured Crisis: Liability Insurance Companies Have Created A Crisis and Dumped It On You*, Consumer Reports, Aug. 1986, at 544.

U.S. 579, 589 (1952).[32] The prevalence of medical negligence in this country and the various efforts to combat it assure that this issue of restricting compensation to the most badly injured victims will remain at the forefront of the national debate on health care.[33]

CONCLUSION

As Justice White stated in his *Fein* dissent seven years ago: "The issue is important, and is deserving of this Court's review." 474 U.S. at 895. The fully percolated conflict below and the recurring national significance of this issue now present a compelling case for review by this Court. Petitioners respectfully urge this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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September 25, 1992

[32] *See also Waggoner v. Gibson*, 647 F.Supp. at 1107 ("constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to override the former at the expense of those who prove at trial that they were most seriously injured by acts of malpractice"); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d at 911-12 ("there is no crisis situation, short of civil insurrection, sufficient to deprive, water down or make less valuable the right to seek redress of grievances, . . .").

[33] A recent study of New York hospitals conducted by the Harvard School of Public Health concluded that an enormous percentage of meritorious malpractice claims are never brought by the victim or the victim's family. Harvard Medical Practice Study, *"Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York"* (February 1990), at p. 6 ("eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State").

APPENDICES

INDEX TO APPENDICES

APPENDIX A — Page

Opinion of the Supreme Court of Missouri, en banc, in *Adams v. The Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. 1992) 1a

APPENDIX B

Jury Verdict A (February 28, 1991) 20a

APPENDIX C

Judgment Entry in Circuit Court (March 15, 1991) 23a

APPENDIX D

Order Denying Plaintiffs' Motion to Modify Judgment of Trial Court (May 17, 1991) 26a

APPENDIX E

Mo. Rev. Stat., Ch. 538 (1986) (Tort Actions Based on Improper Health Care) 28a

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 73867

NICOLE ADAMS, a minor, by and through her legal guardian and next friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, individually,

Appellants,

vs.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,

Respondents.

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY

Filed May 19, 1992

Rehearing Denied June 30, 1992

ROBERTSON, Chief Justice.

This appeal from a judgment in a medical malpractice suit challenges, among other things, the constitutionality of portions of this state's legislative response to increases in the cost of health care services resulting from a perceived medical malpractice insurance crisis. We have jurisdiction. Mo. Const. art. V, § 3. We conclude that the challenged provisions of Chapter 538, RSMo 1986, are constitutional.[1] The remaining issues are transferred

[1] All statutory references are to RSMo 1986 unless otherwise indicated.

to the Court of Appeals, Western District, for appellate review.

I.

Proper medical care has the power to restore, to turn a temporary tragedy into a triumph over disease and injury; negligently provided medical care has the power to destroy, to turn a temporary trauma into a permanent tragedy. In this case, medical negligence did not make whole; it ripped a life asunder; it turned the trauma of household burns into the tragedy of total dependence, of brain damage, of a severe and permanent handicap.

On March 25, 1988, Nicole Adams, a gifted eight-year-old, practiced in her family kitchen a singing and dancing routine for an upcoming recital. Julia Alice Adams, Nicole's mother, watched Nicole dance as she prepared the evening meal. The dance routine took Nicole near the stove. She struck the handles of two skillets, which overturned, dumping hot grease and frying hamburgers onto the right side of Nicole's body.

Mrs. Adams rushed Nicole to Children's Mercy Hospital (the Hospital). The Hospital admitted Nicole and scheduled her for skin graft surgery on March 30, 1988. That morning, Dr. Ronald Sharp performed the skin graft surgery. Anesthesia Associates of Kansas City, Inc. (Anesthesia Associates), which operated the Hospital's anesthesia department under contract with the Hospital, assigned Dr. Jane Jelinek-Boozalis (Dr. Jelinek), an anesthesia resident from the University of Kansas Medical Center, to the case. Dr. Robert Binda and Dr. Peter Mestad, both of Anesthesia Associates, supervised Dr. Jelinek.

During the operation Nicole received 7,000 cc's—7 liters —of crystalloid solution intravenously. Crystalloid is a saline solution of 99 percent water and 1 percent other dissolved substances. It is used to replace body fluid lost during surgery. A person of Nicole's weight (approxi-

mately 60 pounds) would normally receive no more than 2,350 cc's of crystalloid.

The introduction of such a massive amount of fluid caused Nicole's body to swell. In the recovery room, Dr. Mestad, who supervised Nicole's anesthesia recovery and who was aware of the amount of crystalloid Nicole had received during the procedure, removed the endotracheal tube from Nicole. This tube served to protect Nicole's airway. Once Dr. Mestad removed the tube, fluid-induced swelling closed Nicole's trachea. Respiratory and cardiac failure followed. No oxygen reached Nicole's brain for approximately six minutes.

Nicole is now cortically blind. She suffers motor disabilities which cause her to walk very clumsily and awkwardly. She can barely move her fingers in a coordinated manner or in any intended sequence. Her brain is significantly damaged; she now has epilepsy; she can no longer add two plus two. She will never be able to function independently or support herself by working.

The jury returned a verdict against the health care defendants and apportioned fault as follows:

Children's Mercy Hospital	**20%**
Nurse Rousher	**0%**
Nurse Dooley	**0%**
Dr. Jelinek	**18%**
Dr. Sharp	**2%**
Dr. Binda	**10%**
Dr. Mestad	**50%**
Dr. Powers	**0%**

The jury assessed the Adamses' total damages in excess of $20 million. That amount included over $13 million in "noneconomic" damages. The trial court reduced the judgment as directed by Section 538.210.

The Adamses and the Hospital filed motions for new trial and, when those were not successful, appealed. Dr. Jelinek failed to move for a new trial. She now seeks plain error review.

II.

On appeal, this Court decides only the constitutional questions raised in the Adamses' appeal. The Adamses contend that those portions of Section 538.210 limiting noneconomic damages; of Section 538.220 permitting payment of future damages in periodic or installment payments; and of Section 538.230.2 modifying joint and several liability violate a host of provisions of the Missouri Constitution: (1) the open courts provision, Mo. Const. art. I, § 14; (2) right to trial by jury, Mo. Const. art. I, § 22(a); (3) equal rights and opportunities, Mo. Const. art. I, § 2; (4) due process, Mo. Const. art. I, § 10; (5) special law, Mo. Const. art. III, § 40(28); (6) privileges and immunities, Mo. Const. art. I, § 13; (7) one subject requireemnt, Mo. Const. art. III, § 23; (8) separation of powers, Mo. Const. art. III, § 1; and (9) the constitutional directives for amending statutes, Mo. Const. art. III, § 28. In due course, we will consider plaintiffs' constitutional claims. First, however, it is necessary to lay out the factual background upon which plaintiffs found those claims.

A.

The jury returned its verdict in this case in favor of plaintiffs Nicole Adams and her mother, Julia Alice Adams, in the following amounts:

For Nicole Adams:

Past Economic Damages	$ 141,379.00
Future Economic Damages	$ 760,042.00
Future Medical Damages	$ 4,947,311.00
Past Non-Economic Damages	$ 3,905,000.00

Future Non-Economic Damages.....	$10,000.000.00
Total Damages	$19,750,732.00 [2]

For Julia Alice Adams:

Past Non-Economic Damages	$ 250,000.00
Future Non-Economic Damages.....	$ —0—
Total Damages	$ 250,000.00

But for the intervention of Chapter 538, plaintiffs claim that the judgment entry should be as follows:

VERDICT FOR NICOLE ADAMS	$19,750,732.00
Less: Present Value of Settlements Paid to Date	−4,500,000.00
	$15,250,732.00
Plus: Pre-and Post-Judgment Interest Pursuant to Section 408.040 (1/9/90 to 10/9/91)	+2,494,638.00
TOTAL JUDGMENT FOR NICOLE ADAMS (Not Including Court Costs)	$17,745,370.00
VERDICT FOR JULIA ALICE ADAMS	$ 250,000.00
Less: Present Value of Settlements	−1,005,779.00
TOTAL JUDGMENT FOR JULIA ALICE ADAMS	$ —0—

Applying Chapter 538 to the jury's verdict in this case, the trial court entered judgment as follows:

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[2] The numbers reported here are taken from the jury's findings in Verdict A. The jury incorrectly added Nicole Adams' Total Damages. The actual total of the itemized damages found by the jury is $19,753,732.00

VERDICT FOR NICOLE ADAMS:

Total Economic Damages	$ 5,848,732.00
Less: Medical Bills Paid by The Children's Mercy Hospital	−28,232.25
Less: Medical Bills Absorbed by The Children's Mercy Hospital	−114,184.52
Net Economic Damages	$ 5,706,315.00
TOTAL NON-ECONOMIC DAMAGES	$13,905,000.00
Total Economic Damages: ($5,848,732.00 × .38)[3]	$ 2,222,518.16
TOTAL NON-ECONOMIC DAMAGES: ($430,000.00 × 2 defendants)	$ 860,000.00
TOTAL JUDGMENT FOR NICOLE: (Not Including Court Costs)	$ 3,082,518.16

Section 538.210 provides:

> In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for non-economic damages from any one defendant.[4]

Section 538.220 permits any party to a medical malpractice action to request, before entry of the judgment, that the court order that "future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds $100,000.00." The statute requires the paying party to

[3] The total fault assessed to released persons equal 62 percent, leaving only 38 percent of the fault apportioned among present defendants.

[4] Section 538.210.4 permits the court to adjust the cap for inflation. At the time of this trial, the cap had risen from $350,000 to $430,000.

post sufficient security to assure payment of the judgment.

Section 538.230.2 modifies joint and several liability. "[A]ny defendant against whom an award of damages are made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant."

B.

A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991), *citing Winston v. Reorganized School Districts R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982). When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional. *Blaske*, 821 S.W.2d at 828-29, *citing Schnorbus v. Director of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990).

C.

Equal Protection

The Adamses claim that the challenged provisions of Chapter 538 deny them equal protection of the laws as required by the Fourteenth Amendment of the United States Constitution and article I, section 2, of the Missouri Constitution.

Equal protection analysis requires the court to determine initially whether the classification burdens a "suspect class" or impinges upon a "fundamental right." If it does neither, the statute will survive an equal protection challenge if its classifications are rationally related to a legitimate state interest. *Mahoney v. Doerhoff Surgi-*

cal Services, 807 S.W.2d at 503, 512 (Mo. banc 1991); *Blaske*, 821 S.W.2d at 829. "Fundamental rights" include, but are not limited to, freedom of speech, freedom of the press, freedom of religion, the right to vote, the right to personal privacy and other basic liberties. *Mahoney*, 807 S.W.2d at 512; *Blaske*, 821 S.W.2d at 829; *State Board of Registration v. Giffen*, 651 S.W.2d 475, 479-80 (Mo. banc 1983). A "suspect" classification "is one which is inherently suspect in a constitutional sense. These are classes such as those based upon race, national origin or illegitimacy, which, because of historical reasons, need special protection from a political process controlled by the majority." *Blaske*, 821 S.W.2d at 829, *citing Mahoney*, 807 S.W.2d at 512.

The Adamses claim that the right to a trial by jury, the right to open courts and the right to a certain remedy are "fundamental rights" and that victims of medical malpractice are a "suspect class." The latter assertion is without support in either law or reason. We reject the notion that victims of medical malpractice are a suspect class. *Mahoney*, 807 S.W.2d at 512.

Even were we to accept the Adamses' argument that rights to trial by jury, open courts and certain remedies are fundamental rights for the sake of argument, as the discussions at II, D and E, *infra*, show, those rights are not violated by the challenged provisions of Chapter 538.

Because neither a denial of a fundamental right nor a suspect class is present in this case, the challenged statutory provisions will be upheld if rationally related to a legitimate state interest. *Mahoney*, 807 S.W.2d at 512. Rational basis review is minimal in nature. *Schnorbus*, 790 S.W.2d at 243. A statutory classification will be upheld if "any state of facts reasonably may be conceived to justify it." *Mahoney*, 807 S.W.2d at 512. Under a rational basis review, a court will strike down the challenged legislation "only if the classification rests on grounds wholly irrelevant to the achievement of the

state's objective." *Id.* Furthermore, as we have repeatedly said, "It is not [the Court's] province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Blaske*, 821 S.W.2d at 829, *quoting Winston*, 636 S.W.2d at 327. "The fact that we think the legislature's choices socially undesirable, unwise, or even unfair is of little consequence to our decision . . . if the legislature's classification advances the legislature's legitimate policy." *Findley v. City of Kansas City*, 782 S.W.2d 393, 396 (Mo. banc 1990).

Under Section 538.205 a "Health care provider" is:

> [A]ny physician, hospital, ambulatory surgical center, long-term care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate.

The statute purposely treats this restrictive class much differently than any other kind of tortfeasor who might be involved in a negligence lawsuit. Section 538.210 places a liability cap on noneconomic damages in any action against a health care provider that arises out of the rendering of health care services. Section 538.220 allows future damages to be paid in periodic or installment payments if the total award exceeds $100,000. Section 538.230 alters traditional joint and several liability and provides for apportioned fault to include a percentage allocated for parties who have been releaesd from liability.

The exact purpose of this classification is somewhat uncertain. Amici supporting the legislation tell us that the provisions of Chapter 538 were enacted in 1986 in an effort to address a perceived malpractice insurance crisis in the health care industry which in turn threatened the availability and affordability of health care services.

According to Amicus Briefs in support of the health care respondents, the legislature had before it information that the number of malpractice claims in Missouri increased 249 percent between 1981 and 1986; that aggregate and individual damage awards had accelerated to the extent that the state risked losing insurers; and that many physicians were believed to be considering leaving high risk areas of practice, potentially leaving many Missourians, particularly those in rural areas, without adequate medical protection. Thus, we are told that the primary goal of the General Assembly in passing Chapter 538 was to confront a medical malpractice insurance crisis that threatened adversely to affect primary health care in Missouri. Accordingly, the statute represents an effort by the legislature to reduce rising medical malpractice premiums and in turn prevent physicians and others from discontinuing "high risk" practices and procedures.

Both sides offer an array of evidence that both supports and refutes the existence of a "crisis" in medical malpractice premiums—enough evidence, in fact, that at the very least, it is a debatable proposition that such a crisis does in fact exist. Under equal protection rational review, this doubt must be resolved in favor of the General Assembly. While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists. Here, the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives that can be achieved, if only inefficiently, by the statutory provision under attack here.

The legislature could rationally believe that the cap on non-economic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers. Were this to result, the legislature could reason, physicians would be

willing to continue "high risk" medical practices in Missouri and provide quality medical services at a less expensive level than would otherwise be the case.

The noneconomic damage cap does not take away from any economic or punitive damage award. Moreover, the limit on noneconomic damages still allows $430,000 per liable defendant in this case, in addition to the nearly $5.9 million awarded in economic damages. As such, the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians.

Similarly, Section 538.220 is rationally related to the general goal of preserving adequate, affordable health care for all Missourians. It permits defendants to satisfy a judgment for future damages in periodic or installment payments. By permitting installment payments, the legislature could reason that spreading future judgment payments over a period of time would reduce costs to insurance companies and reduce insurance premiums, lowering insurance premiums and making medical services less expensive and more available than would otherwise be the case.

Section 538.230.1 requires the finder of fact to apportion fault among all parties, including those who have been released from liability. Section 538.230.2 alters common law joint and several liability. "[A]ny defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant." This alteration of joint and several liability limits the potential financial exposure of a health care defendant to the amount of that defendant's own responsibility for the plaintiff's injury. By so doing, the legislature could have reasoned that limiting the exposure of any individual defendant would reduce any individual insurance carrier's financial responsibility for a plaintiff's

injuries caused by multiple tortfeasors (as is generally the case in medical malpractice actions), and serve to reduce or limit malpractice insurance premiums with the results previously discussed.

We hold that the provisions of Chapter 538 do not violate equal protection.

D.

Open Courts

Article I, section 14, provides:

> [t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Appellants claim that Chapter 538 violates the "open courts" and "certain remedy" provisions of Missouri Constitution by permitting the legislature to intrude impermissibly upon the judicial process.

This Court has distinguished between statutes that imposed procedural bars to access, and statutes that change the common law by the elimination (or limitation of) a cause of action. *Cf. State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*, 583 S.W.2d 107 (Mo. banc 1979), with *Blaske*, 821 S.W.2d 822 (Mo. banc 1991). The former are impermissible; the latter are a valid exercise of a legislative prerogative.

In *Blaske*, for example, this Court upheld a statute of repose that eliminated a cause of action for personal injury or wrongful death against designers and builders ten years following completion of construction. We held that the statute in *Blaske* did not violate article I, section 14, because that staute did not bar access to the courts to persons who had a valid cause of action; it simply modified the common law so that after ten years, the cause of action could be pursued. Similarly, in *Harrell v.*

Total Health Care, Inc., 781 S.W.2d 58, 59-61 (Mo. banc 1989), this Court upheld a legislative elimination of all causes of action for medical malpractice against health service corporations as a valid exercise of legislative discretion to change the substantive common law.

In contrast, this Court in *Cardinal Glennon* determined that a pretrial procedure that required a malpractice plaintiff to submit his or her claim to the Professional Liability Review Board before filing a cause of action contained an impermissible precondition on the plaintiff's right to access the courts.[5]

Here, Chapter 538 modifies the common law; it does not erect a condition precedent or any other procedural barrier to access to the courts. Nor does Chapter 538 deny plaintiffs a lawful remedy for a wrong done; it simply redefines the substantive law by limiting the amount of noneconomic damages plaintiffs can recover. In sum, the constitutional right of access assures Missourians of the "right to pursue in the courts the causes of action the substantive law recognizes." *Mahoney*, 807 S.W.2d at 510; *Findley*, 782 S.W.2d at 396. It does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination.

The Adamses nonetheless suggest that the General Assembly must establish a reasonable substitute before abolishing or restricting a common law cause of action. They argue that without this *quid pro quo*, the statute arbitrarily denies full compensation to an injured plaintiff. They rely on *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), and *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987), as support for this proposition.

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[5] This Court in *Mahoney* distinguished *Cardinal Glennon* by noting that Section 538.225, unlike the statute under scrutiny in *Cardinal Glennon*, "does not operate until after the petition is filed and the incidents of jurisdiction to adjudicate are met." *Mahoney*, 807 S.W.2d at 509.

In *Lucas*, the Texas Supreme Court, on a certified question from the Fifth Circuit, found a Texas statute limiting total damages against a physician or health care provider to $500,000 and noneconomic damages to $150,000 unconstitutional. That court applied the open courts clause of the Texas Constitution to invalidate this total damage limitation by stating:

> We hold that the restriction is unreasonable and arbitrary and that [the statutory provisions] unconstitutionally limit Lucas's right to access to the courts . . . . the legislature has failed to provide Lucas any *adequate substitute* to obtain redress for his injuries.

[Emphasis added.] *Lucas*, 757 S.W.2d at 690.

The Supreme Court of Florida in similar fashion had earlier held that a $450,000 ceiling on noneconomic damages on all tort and contract cases violated the open courts provision of the Florida constitution. The Court first compared the Tort Reform Act with other constitutionally sound statutes that placed similar restrictions on plaintiffs' right to recover (e.g., no-fault insurance and sovereign immunity), and then held the statutory restrictions impermissible unless the legislature: (1) provided a reasonable alternative remedy or commensurate benefit or (2) showed an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity. *Smith*, 507 So.2d at 1088.

Missouri courts have never interpreted article I, section 14 of our constitution to mean more than its original, textually implicit purpose to assure Missourians of procedural due process. Thus, the "reasonable substitute" holdings of Texas and Florida are an interesting judicial gloss on the constitution. We reject the Texas and Florida interpretations. They arbitrarily and unnecessarily limit the legitimate lawmaking role of the legislative branch in a manner not intended by our constitution. Even

arcane causes of action would be difficult for the legislature to eliminate under a *quid pro quo* requirement. Moreover, the Texas-Florida interpretation views the common law as an inviolate body of law, rather than as a starting point from which judicial declarations are subject to modification by legislative policy choices and subsequent judcial decisions necessary to meet the needs of a changing society. *Yerger v. Smith*, 89 S.W.2d 66, 74, 338 Mo. 140 (1935); *O'Dell v. School District of Independence*, 521 S.W.2d 403, 405 (Mo. banc 1975). Furthermore, by statute and decision, the common law is in force in Missouri only to the extent that it has not been subsequently changed by the legislature or judicial decision. Section 1.010; *Cook v. Cook*, 124 S.W.2d 675, 232 Mo. App. 994 (1939).

The reasoning of the Texas and Florida decisions seem to apply equally to legislatively adopted causes of action. We doubt the wisdom of a rule of law that limits the legislature's ability to respond statutorily to changing societal concerns or correct previous policy positions upon receipt of better information.

The challenged portions of Chapter 538 do not violate article I, section 14.

E.

Trial by Jury

The Adamses' related argument is that the limitation on noneconomic damages denies plaintiffs their constitutional right to trial by jury. Article I, section 22(a) of the Missouri Constitution, provides in pertinent part:

> That the right of trial by jury as heretofore enjoyed shall remain inviolate . . . .

Appellants argue that this right includes the right to have the jury determine all damages without interference by the legislature.

The constitutional guarantee of the right to a jury trial has remained the same through four Missouri constitutions commencing with the Constitution of 1820. Thus, the right to jury trial protected by the present constitution is that which existed at common law before the adoption of the first constitution. *Goodrum v. Asplundh Tree Expert Company*, 824 S.W.2d 6, 11 (Mo. banc 1992), *quoting Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. 1979).

A jury's primary function is fact-finding. This includes a determination of a plaintiff's damages. *Jaycox v. Brune*, 434 S.W.2d 539, 542-43 (Mo. 1968). Here, the jury assessed liability and then determined damages, both economic and noneconomic. With that the jury completed its constitutional task.

The court applies the law to the facts. Section 538.210 establishes the substantive, legal limits of the plaintiffs' damage remedy. In this sense, the permissible remedy is a matter of law, not fact, and not within the purview of the jury. Because Section 538.210 is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to a jury trial. *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989). *See also Tull v. United States*, 481 U.S. 412 (1987) (Interpreting the Clean Water Act). There is no substantive right under the common law to a jury determination of damages under the Seventh Amendment. The assessment of a civil penalty is not one of the "fundamental elements" preserved by the common law right to a jury trial); and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88-89 (1978) (The common law never recognized a right to a full recovery in tort.)

In sum, the legislature has the right to abrogate a cause of action cognizable under common law completely. *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640, 649

(Mo. 1931); *accord Harrell, Mahoney, Goodrum, supra.* If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action. The point is denied.

F.

Due Process

Appellants claim that the challenged portions of Chapter 538 violate the Due Process clause of article I, section 10 of the Missouri Constitution, which reads in pertinent part:

> That no person shall be deprived of life, liberty or property without due process of law.

The analysis required for this issue is the same as appellants' Open Courts claim under article I, section 14. (II, D, *supra*). Both clauses of the Missouri Constitution guarantee "no more than that a claimant is entitled to whatever process is constitutionally mandated or permitted under the laws extant at the time of claim." *Goodrum*, slip op. at 8, *quoting Findley*, 782 S.W.2d at 397-98. Here, the plaintiffs received all the process due them under law. We hold that the challenged portions of Chapter 538 do not violate due process.

G.

The Adamses also raise an equal protection challenge to Section 538.300, RSMo 1989. That statute does not permit prejudgment interest on judgments against health care providers. The Adamses also claim that the challenged provisions of Chapter 538 violate: (1) the requirement of one subject (art. III, § 23); (2) the privileges and immunities clause (art. 1, § 13); (3) the constitutional directives for amending statutes (art. III, § 28); (4) the prohibition against special laws (art. III, § 40 (28)); and (5) separation of powers (art. II, § 1).

The Adamses failed to preserve these constitutional challenges for appellate review. They were not raised at the earliest opportunity, but only after the trial court entered its judgment in post-trial motions.

In *Land Clearance for Redevelopment v. Kansas City*, 805 S.W.2d 173 (Mo. banc 1991), the appellant first raised the unconstitutionality of the statutory interest rate in a motion to amend the judgment. Appellants argued that the constitutional questions presented themselves only after judgment was entered on the verdict and could not have been known in advance. This Court held that the constitutional claim was waived when it was not raised at the earliest opportunity. We noted that the appellant could not have been surprised by the trial court's utilization of the statutory interest rate and that this issue could easily have been asserted before judgment. We reasoned that failure to raise the constitutional issue at an earlier stage denied party opponents an opportunity to offer an evidentiary response and denied the trial court a full opportunity to identify and rule on the issue. *Land Clearance*, 805 S.W.2d at 175-76. Moreover, "[a]n attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Id.* at 176.

In similar fashion, the Adamses first raised the constitutional challenge to the prejudgment interest statute and the remaining constitutional issues in a post-trial motion to modify judgment.[6] As did the appellants in *Land Clearance*, the Adamses also assert that these matters were not "justiciable" until after trial. *Land Clearance* rejects the Adamses' argument as to prejudgment interest. It is denied here as well. As to the remaining constitutional issues, there is nothing pecular to these

[6] The "separation of powers" argument, however, apparently was first raised in appellants' brief to this Court.

constitutional provisions that would require a specific verdict before a challenge could be made. For the reasons expressed in *Land Clearance*, the remaining constitutional points are also denied.

III.

The Adamses' constitutional challenges are denied. The cause is transferred to the court of appeals.

Covington, Holstein, Benton, Thomas, JJ., and Blackmar, Sr.J., concur; Rendlen, Sr.J. dissents. Price, J., not sitting because not a member of the Court when case was submitted.

APPENDIX B

VERDICT A

NOTE: Complete this form by writing in the names required by your verdict.

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant The Children's Mercy Hospital, we, the undersigned jurors, find in favor of:

NICOLE ADAMS

(Plaintiff Nicole Adams)

or

(Defendant The Children's Mercy Hospital)

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant Suzanna Roushar, R.N., we, the undersigned jurors, find in favor of:

(Plaintiff Nicole Adams)

or

SUZANNA ROUSHAR

(Defendant Suzanna Roushar, R.N.)

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant Cynthia Dooley, R.N., we, the undersigned jurors, find in favor of:

(Plaintiff Nicole Adams)

or

CYNTHIA DOOLEY

(Defendant Cynthia Dooley, R.N.)

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant Jane Jelinek-

Boozalis, M.D., we, the undersigned jurors, find in favor of:

NICOLE ADAMS

(Plaintiff Nicole Adams)

or

_____

(Defendant Jane Jelinek-Boozalis, M.D.)

NOTE: Complete the following only if one or more of the above findings is in favor of Plaintiff Nicole Adams.

Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that Plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, assess the damages of Plaintiff Nicole Adams as follows:

For past economic damages, including past medical damages,	$ 141,379.00
For future economic damages, excluding future medical damages,	$ 760,042.00
For future medical damages,	$ 4,947,311.00
For past non-economic damages,	$ 3,905,000.00
For future non-economic damages,	$10,000,000.00
TOTAL DAMAGES—	$19,750,732.00

NOTE: Complete the following paragraph by writing in the words required by your verdict.

On the claim of Julia Alice Adams for damages due to injury to her child Nicole Adams, we, the undersigned jurors find that Plaintiff Julia Alice Adams DID ("did" or "did not") sustain damages as a direct result of injury to her child Nicole Adams.

NOTE: Complete the following paragraph only if the above-finding is that Julia Alice Adams "did" sustain such damage.

We, the undersigned jurors, assess the damages of Plaintiff Julia Alice Adams as follows:

For past non-economic damages,	$250,000.00
For future non-economic damages,	$ —0—
TOTAL DAMAGES—	$250,000.00

NOTE: All jurors who agree to the above must sign below:

/s/ Terrie E. Williams

/s/ Carrie E. Whitney

/s/ Tammy Schupp

/s/ Linda Schwark

/s/ Rosemary Groves

/s/ Ellen Sears

/s/ Thomas E. Robb

/s/ Terry J. McCarty

/s/ Donald E. Barza

/s/ Dixie G. Clark

APPENDIX C

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV89-23626

Civil Docket "M"

NICOLE ADAMS, A Minor Child, by and through her Legal Guardian and Next Friend, JULIA ALICE ADAMS,
Plaintiffs,

v.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,
Defendants.

JUDGMENT

NOW ON THIS 14th day of March, 1991, pursuant to the verdict of the jury rendered in this cause on February 28, 1991,

IT IS HEREBY ORDERED AND ADJUDGED by the Court that plaintiff Nicole Adams, a minor, by and through her next friend and legal guardian Julia Adams, recover from defendants The Children's Mercy Hospital and Jane Jelinek-Boozalis, M.D., damages in the following amounts:

VERDICT FOR NICOLE ADAMS:	
Total Economic Damages	$ 5,848,732.00
Less medical bills paid by Children's Mercy Hospital	$ 28,232.25
Less medical bills absorbed by Children's Mercy Hospital	$ 114,184.52

Net Economic Damages	$ 5,706,315.30
Total Non-Economic Damages	$13,905,000.00
Applying Cap Pursuant to § 538.210	$ 430,000.00

Section 538.230 RSMo., provides that plaintiff's claim is to be reduced by the amount of released persons' equitable share of the total obligation pursuant to full apportionment of fault as though there had been no release. The total fault assessed to released persons equals 62%, leaving only 38% of the fault apportioned among defendants in the case. Of that amount, 20% was apportioned to defendant Children's Mercy Hospital and 18% was apportioned to defendant Jane Jelinek-Boozalis, M.D.

Accordingly, plaintiff Nicole Adams' net damages are as follows:

TOTAL ECONOMIC DAMAGES:	
($5,848,732.00 × .38)	$ 2,222,518.16
TOTAL NON-ECONOMIC DAMAGES:	
($430,000.00 × 2 "defendants")	$860,000.00
TOTAL JUDGMENT FOR NICOLE (not including Court costs):	$3,082,518.16

Of that amount, the breakdown of damages is as follows:

Against Children's Mercy Hospital:	
Economic Damages:	
($5,848,732.00 × .20)	$1,169,746.40
Non-Economic Damages:	$430,000.00
Children's Mercy Hospital's Total Share:	$1,599,746.40
Less credit for medical bills to CMH	$142,416.57
Children's Mercy net share	$1,485,561.88

Against Defendant Jane Jelinek-Boozalis, M.D.:	
Total Economic Damages:	
($5,848,732 × .18)	$1,052,771.76
Total Non-Economic Damages:	$430,000.00
Defendant Jelinek's total share:	$1,482,771.76

IT IS FURTHER ORDERED AND ADJUDGED by the Court that plaintiff Julia Adams recover from the defendants Children's Mercy Hospital and Jane Jelinek-Boozalis, M.D., the following sums:

Past Economic Damages	
($250,000 × .38)	$95,000.00
Against Defendant Children's Mercy Hospital:	
($250,000.00 × .20)	$50,000.00
Against Defendant Jelinek-Boozalis, M.D.:	
($250,000 × .18)	$45,000.00
Total	$95,000.00

Pursuant to § 538.230(2), defendant Children's Mercy Hospital is jointly and severally liable for the entire amount of $3,082,518.16 to Nicole Adams (less the credit to Children's Mercy Hospital for medical bills), and $95,000.00 to Julia Adams.

Plaintiffs' herein recover nothing from defendants Cynthia Dooley, R.N., and Suzanna Roushar, R.N.

In addition to the above, plaintiffs shall have and recover of and from said defendants the costs of this action.

/s/ John R. O'Malley
THE HONORABLE JOHN R. O'MALLEY
Judge of the Circuit Court

APPENDIX D

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV89-23626
Division Six
Civil Docket "M"

NICOLE ADAMS, A Minor Child, by and through her Legal Guardian and Next Friend, JULIA ALICE ADAMS,
Plaintiffs,

vs.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,

ORDER

NOW ON THE 12TH DAY of April 1991, the above cause comes before the Court on Plaintiff's Motion to Modify Judgment of Trial Court, or Alternatively, Motion for New Trial, filed the 15th day of March, 1991, Defendant Children's Mercy Hospital's Motion for Judgment Nothwithstanding the Verdict or, in the Alternative, for a New Trial filed the 15th day of March, 1991; and Defendant, Childrens Mercy Hospital's, and Defendant, Jane Jelenick-Boozalis, MD's Request for Periodic or Installment Payment of Future Damages.

The Court having read the pleadings and heard the arguments of the parties, and being fully advised in the premise, enters the following orders:

(1) Plaintiff's Motion to Modify Judgment of Trial Court or, Alternatively, Motion for New Trial is hereby OVERRULED.

(2) Defendant, Childrens Mercy Hospital's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial is hereby OVERRULED.

(3) Defendant, Childrens Mercy Hospital's Request for Periodic or Installment Payment of Future Damages is hereby SUSTAINED. Therefore, payment is ordered as follows:

1. One payment per year in the amount of $300,000.00 for four years.

2. One payment in the fifth year of $285,561.88.

(4) Defendant, Jane Jelenek-Boozalis, M.D.'s Request for Periodic or Installment Payment of Future Damages is hereby SUSTAINED. Therefore, payment is ordered as follows:

1. One payment per year in the amount of $300,000.00 for four years.

2. One payment in the fifth year of $282,771.76.

IT IS SO ORDERED.

Date: May 17, 1991

/s/ John R. O'Malley
JOHN R. O'MALLEY
Judge

APPENDIX E

STATUTORY PROVISIONS

MO. REV. STAT., Chapter 538 (1986)

(TORT ACTIONS BASED ON IMPROPER HEALTH CARE)

538.205. Definitions

As used in sections 538.205 to 538.230, the following terms shall mean:

(1) "*Economic damages*", damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity;

(2) "*Equitable share*", the share of a person or entity in an obligation that is the same percentage of the total obligation as the person's or entity's allocated share of the total fault, as found by the trier of fact;

(3) "*Future damages*", damages that the trier of fact finds will accrue after the damages findings are made;

(4) "*Health care provider*", any physician, hospital, ambulatory surgical center, long-term care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate;

(5) "*Health care services*", any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized. Professional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care pro-

vider's profession or in furtherance of the purposes for which an institutional health care provider is organized;

(6) *"Medical damages"*, damages arising from reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services;

(7) *"Noneconomic damages"*, damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages;

(8) *"Past damages"*, damages that have accrued when the damages findings are made;

(9) *"Physician employee"*, any person or entity who works for hospitals for a salary or under contract and who is covered by a policy of insurance or self-insurance by a hospital for acts performed at the direction or under control of the hospital;

(10) *"Punitive damages"*, damages intended to punish or deter willful, wanton or malicious misconduct;

(11) *"Self-insurance"*, a formal or informal plan of self-insurance or no insurance of any kind.

538.210. Limitation on noneconomic damages—jury not to be informed of limit—limit, how set annually, publication—defendant defined—punitive damages, requirements

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant as defendant is defined in subsection 2 of this section.

2. *"Defendant"* for purposes of sections 538.205 to 538.230 shall be defined as:

(1) A hospital as defined in chapter 197, RSMo, and its employees and physician employees who are insured under the hospital's professional liability insurance policy or the hospital's self-insurance maintained for professional liability purposes;

(2) A physician, including his nonphysician employees who are insured under the physician's professional liability insurance or under the physician's self-insurance maintained for professional liability purposes;

(3) Any other health care provider having the legal capacity to sue and be sued and who is not included in subdivisions (1) and (2) of this subsection, including employees of any health care providers who are insured under the health care provider's professional liability insurance policy or self-insurance maintained for professional liability purposes.

3. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, where the trier of fact is a jury, such jury shall not be instructed by the court with respect to the limitation on an award of noneconomic damages, nor shall counsel for any party or any person providing testimony during such proceeding in any way inform the jury or potential jurors of such limitation.

4. The limitation on awards for noneconomic damages provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. The current value of the limitation shall be calculated by the director of the division of insurance, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register as soon after each January first as practicable, but it shall

otherwise be exempt from the provisions of section 536.021, RSMo.

5. Any provision of law or court rule to the contrary notwithstanding, an award of punitive damages against a health care provider governed by the provisions of sections 538.205 to 538.230 shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the petition.

538.215. Damage itemization by trier of fact—excess noneconomic damages to be reduced by court

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, any damages found shall be itemized by the trier of fact as follows:

(1) Past economic damages;

(2) Past noneconomic damages;

(3) Future medical damages;

(4) Future economic damages, including future medical damages; and

(5) Future noneconomic damages.

2. All future damages which are itemized as required by subsection 1 of this section shall be expressed by the trier of fact at present value.

3. Any award of noneconomic damages in excess of the limit provided herein shall be reduced by the court to the maximum amount.

538.220. Damages, how paid—security required for future damage payments, when—attorney's fees—death of judgment creditor, effect

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, past damages shall be payable in a lump sum.

2. At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify the recipient, the amount of each payment, the interval between payments, and the number of payments. The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval. However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

3. As a condition to authorizing periodic payments of future damages, the court may require a judgment debtor who is not adequately insured to post security or purchase an annuity adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security or so much as remains to the judgment debtor.

4. If a plaintiff and his attorney have agreed that attorney's fees shall be paid from the award, as part of a

contingent fee arrangement, it shall be presumed that the fee will be paid at the time the judgment becomes final. If the attorney elects to receive part or all of such fees in periodic or installment payments from future damages, the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff and not subject to the terms of the payment of future damages, whether agreed to by the parties or determined by the court.

5. Upon the death of a judgment creditor, the right to receive payments of future damages, other than future medical damages, being paid by installments or periodic payments will pass in accordance with the Missouri probate code unless otherwise transferred or alienated prior to death. Payment of future medical damages will continue to the estate of the judgment creditor only for as long as necessary to enable the estate to satisfy medical expenses of the judgment creditor that were due and owing at the time of death, which resulted directly from the injury for which damages were awarded, and do not exceed the dollar amount of the total of payments for such future medical damages outstanding at the time of death.

538.225. Affidavit by a health care provider certifying merit of case—content filed, when—failure to file, effect

1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or his attorney shall file an affidavit with the court stating that he has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.

2. The affidavit shall state the qualifications of such health care providers to offer such opinion.

3. A separate affidavit shall be filed for each defendant named in the petition.

4. Such affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended.

5. If the plaintiff or his attorney fails to file such affidavit the court may, upon motion of any party, dismiss the action against such moving party without prejudice.

538.230. Apportionment of fault authorized—defendants jointly and severally liable, when—release of one defendant, effect

1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.

2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under subsection 3 of this section and enter judgment against each party liable on the basis of the rules of joint and several liability. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose appor-

tioned percentage of fault is equal to or less than such defendant.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

538.235. Laws applicable to what actions

The provisions of sections 538.205 to 538.230 shall apply only to causes of actions arising on or after February 3, 1986.

538.300. Certain laws not applicable to sections 538.205 to 538.230

The provisions of sections 260.552, RSMo, 408.040, RSMo, 490.715, RSMo, 509.050, RSMo, 510.263, RSMo, 537.067, 537.068, 537.117, 537.675, and 537.760 to 537.765, RSMo, shall not apply to actions under sections 538.205 to 538.230.

(2)

FILED
OCT 26 1992
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No. 92-533

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Missouri

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Due Process clause of the Fourteenth Amendment violated by a state statute limiting the amount of noneconomic damages a plaintiff may recover in a medical malpractice action because the legislature did not provide a *quid pro quo* for the common law remedy restricted by such statute?

2. Is the Equal Protection clause of the Fourteenth Amendment violated by a state statute limiting the amount of noneconomic damages a plaintiff may recover in a medical malpractice action because such statute treats medical malpractice plaintiffs differently than plaintiffs in other types of personal injury actions?

PARTIES TO THE PROCEEDINGS

The Petitioners have accurately set forth the parties to the proceedings in their Petition for Writ of Certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS.	ii
TABLE OF AUTHORITIES.	vi
OPINION BELOW	1
JURISDICTION.	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI . .	4
I. THIS COURT LACKS JURISDICTION TO ADDRESS PETITIONERS' DUE PROCESS CHALLENGE TO MO. REV. STAT. §538.210.1 BECAUSE OF PETITIONERS' FAILURE TO RAISE THIS ISSUE IN THE MISSOURI SUPREME COURT AND BECAUSE OF THAT COURT'S FAILURE TO PASS EXPRESSLY UPON THIS FEDERAL QUESTION.	5
II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE RESOLUTION BY THIS COURT OF A PERCEIVED CONFLICT IN STATE COURT DECISIONS IS NOT NECESSARY AND NOT WARRANTED IN THIS CASE.	9

TABLE OF CONTENTS - Continued

Page

III. THE DECISION OF THE MISSOURI SUPREME COURT IS CONSISTENT WITH DECISIONS THAT HAVE BEEN RENDERED BY THE UNITED STATES COURTS OF APPEALS. 12

IV. THE DECISION OF THE MISSOURI SUPREME COURT IS CONSISTENT WITH DECISIONS OF THIS COURT. . 13

V. THIS COURT IS WITHOUT JURISDICTION TO ADDRESS PETITIONERS' ARGUMENT THAT STATUTORY CAPS ON NONECONOMIC DAMAGES RECOVERABLE BY MEDICAL MALPRACTICE PLAINTIFFS ARE ARBITRARY AND CAPRICIOUS IN VIOLATION OF DUE PROCESS. 19

VI. THE MISSOURI SUPREME COURT GAVE FULL AND CAREFUL CONSIDERATION TO THE EQUAL PROTECTION ISSUE AND DECIDED SUCH ISSUE CORRECTLY. 21

VII. THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. 24

CONCLUSION. 25

TABLE OF CONTENTS - Continued

Page

APPENDIX A

Missouri Supreme Court
Appellants' Brief, pp. 90-91,
Adams v. The Children's Mercy Hospital, 832 S.W.2d 898
(Mo. 1992) 1a

TABLE OF AUTHORITIES

CASES: Page

Adams v. Children's Mercy Hospital, 832 S.W.2d 898, 907 (Mo. banc 1992) 6,20, 21,22,24

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 13,19 22,25

Davis v. Omitowoju, 883 F.2d 1155 (3rd Cir. 1989) 13,19

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). 10,15, 16,17

Fein v. Permanente Medical Group, 474 U.S. 892 (1985) 9,10, 11,12

Fein v. Permanente Medical Group, 695 P.2d 665 (1985) 9

Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985). . .13,19,22

Holder v. Elms Hotel Co., 338 Mo. 857, 866, 92 S.W.2d 620, 624 (1936). 14

Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) 13,19

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). 21,22

TABLE OF AUTHORITIES - Continued

	Page
McGowan v. Maryland, 366 U.S. 420, 425-426 (1961).	23
Minnesota v. Cloverleaf Creamery Co., 304 U.S. 144, 153-154 (1938).	23
New York Central R.R. Co. v. White, 243 U.S. 188 (1917)	15
San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1972).	21
Silver v. Silver, 280 U.S. 117 (1929).	17,18
Simpson v. Kilcher, 749 S.W.2d 386 (Mo. banc 1988)	14,15
Webb v. Webb, 451 U.S. 493 (1981)	6,8

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. XIV, §1. . . .	1

STATUTES:

Mo. Rev. Stat. §538.210.1	2,3,4, 5,19,20,24

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Jane Jelinek-Boozalis, M.D., respectfully requests that this Court deny the Petition for Writ of Certiorari filed herein.

OPINION BELOW

Petitioners have accurately set forth in their Petition for Writ of Certiorari the citation of the opinion of the Supreme Court of Missouri and have accurately reproduced the opinion their appendix.

JURISDICTION

Petitioners claim jurisdiction lies with this Court pursuant to 28 U.S.C. §1257(a). However, jurisdiction is lacking in this Court to address Petitioners' first federal question because Petitioners failed to properly raise this federal question in the Missouri Supreme Court and because of that court's failure to pass expressly upon this question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

> any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. §538.210.1:

> 1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for non-economic damages from any one defendant as defendant is defined in subsection 2 of this section.

STATEMENT OF THE CASE

This is a medical malpractice action brought on behalf of a minor, Nicole Adams. The Petitioners originally brought this action against numerous health care providers. Certain health care providers were voluntarily dismissed from this action and, prior to trial, settlement agreements were entered into between the Petitioners and five physicians as well as two professional corporations. The present value of the settlements was $5,505,779.00. The case proceeded to trial against Children's Mercy Hospital;

two nurses, Cynthia Dooley, R.N. and Susan Roushar, R.N.; and Jane Jelinek, M.D. At the conclusion of the trial, the jury returned a verdict in favor of the Petitioners and against Respondents Children's Mercy Hospital and Jane Jelinek, M.D.

At the conclusion of the trial, the jury awarded Nicole Adams $5,848,732.00 in past and future economic damages, as well as $13,905,000.00 in past and future noneconomic damages. The jury awarded Julia Adams, Nicole's mother, $250,000.00 in past noneconomic damages and nothing for future noneconomic damages. (*See*, Petition for Writ of Certiorari, p. 3 and Appendix C attached thereto.) The jury apportioned 62% of the total fault in the case among three health care providers who had been dismissed and with whom the Petitioners had entered into settlement agreements. The remaining 38% of the total fault was apportioned among the remaining defendants in the case, with 20% apportioned to Children's Mercy Hospital and 18% to Jane Jelinek, M.D.

Pursuant to Mo. Rev. Stat. §538.210.1, the award of **noneconomic** damages was adjusted, and the trial court entered judgment for total noneconomic damages in the amount of "$430,000.00 x 2

defendants," or $860,000.00. The total judgment entered in favor of Petitioners and against Respondents was $3,082,518.16 for Nicole Adams and $95,000.00 to Julia Adams.

Although Petitioners claim they raised their federal questions at every stage of the proceedings below, the Petitioners failed to raise in the Supreme Court of Missouri the issue of whether Mo. Rev. Stat. §538.210.1 violated the Due Process Clause of the Fourteenth Amendment because no *quid pro quo* was provided by the legislature for the common law remedy restricted by such statute. Additionally, the Missouri Supreme Court did not consider nor did it expressly pass upon such issue. Therefore, the Petitioners have failed to properly raise this issue at the state supreme court level, and as a result, this Court lacks jurisdiction to address this issue.

ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Petitioners seek to challenge the constitutionality of Mo. Rev. Stat. §538.210.1 on the basis that it violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. The Missouri statute in question does nothing more than

limit the amount of **noneconomic** damages a plaintiff may recover in a medical malpractice action. The Missouri Supreme Court rejected Petitioners' arguments that this statute violated various provisions of the Missouri Constitution. Also, the Missouri Supreme Court rejected Petitioners' argument that such statute denied them equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

For the reasons set forth below, this Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

I. THIS COURT LACKS JURISDICTION TO ADDRESS PETITIONERS' DUE PROCESS CHALLENGE TO MO. REV. STAT. §538.210.1 BECAUSE OF PETITIONERS' FAILURE TO RAISE THIS ISSUE IN THE MISSOURI SUPREME COURT AND BECAUSE OF THAT COURT'S FAILURE TO PASS EXPRESSLY UPON THIS FEDERAL QUESTION.

A review of the opinion rendered by the Missouri Supreme Court reveals the lack of any reference to an argument by the Petitioners that Mo. Rev. Stat. §538.210.1 violates the Due Process Clause of the Fourteenth Amendment. The court does address a due process argument raised. However, the court is addressing solely an

argument that Chapter 538 R.S.Mo. 1986 violates the due process clause of Article I, section 10 of the Missouri Constitution. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. banc 1992). Although the Missouri Supreme Court also addresses an argument that Chapter 538 is unconstitutional because the legislature failed to provide a *quid pro quo* for the common law remedy restricted, the court does so in the context of resolving Petitioners' specific argument that Chapter 538 violates Article I, section 14 (the "open courts" and "certain remedy" provisions) of the Missouri Constitution. *Id.* at 905-906.

In *Webb v. Webb*, 451 U.S. 493 (1981), this Court discussed at length the jurisdictional requirement that the federal question at issue be properly raised, preserved and passed upon by the highest state court below.

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this

> Court can affirmatively show the contrary."

Id. at 495 (citations omitted).

Reviewing Petitioners' "Appellants' Brief" filed with the Missouri Supreme Court, it is apparent that the reason the court failed to pass upon Petitioners' due process argument is in fact because such issue was not properly raised. Petitioners' "Appellants' Brief" filed with the Missouri Supreme Court was 98 pages long. However, the only portion of the brief which can be construed as addressing Petitioners' federal due process argument is approximately one page long. This portion of Petitioners' "Appellants' Brief" is reproduced verbatim at Appendix A attached hereto.

This Respondent acknowledges that a vague reference is made in Petitioners' "Appellants' Brief" to due process of law under the Fourteenth Amendment. However, Petitioners argued that due process of law under the Fourteenth Amendment meant that a person had an opportunity to be heard at a meaningful time. (Appellants' Brief, p. 90.) In addition, the Petitioners argue that there is a constitutional right of access to the courts applicable to the state through the Fourteenth Amendment. (*Id.* at 91.) However, the Petitioners

failed to make any reference to *quid pro quo* and certainly failed to articulate in any fashion an argument that Chapter 538 violated the due process clause of the Fourteenth Amendment because no *quid pro quo* was provided by the legislature for the common law remedy restricted by the statute in question.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. at 496-497 (citations omitted). Further, this Court, in *Webb*, stated:

> At a minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution *was* presented in the state courts and that those courts **were apprised of the nature or substance of the federal claim at the time and in the manner required by state law.**

Id. at 501 (emphasis added).

Because Petitioners failed to properly raise their due process argument in the Missouri Supreme Court and because the court failed to expressly pass upon this federal question, this Court now lacks jurisdiction to address this federal question.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE RESOLUTION BY THIS COURT OF A PERCEIVED CONFLICT IN STATE COURT DECISIONS IS NOT NECESSARY AND NOT WARRANTED IN THIS CASE.

In support of the Petition for Writ of Certiorari, the Petitioners cite, quote from and rely heavily upon Justice White's dissent in *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985). In *Fein*, this Court dismissed an appeal from a California Supreme Court decision for want of substantial federal question. *Id.* at 892. The California Supreme Court had upheld the constitutionality of a California statute which placed a $250,000.00 maximum limitation on recovery of noneconomic damages in medical malpractice actions. The California Supreme Court found this statute constitutional and rejected the challenge by the plaintiff therein that the statute contravened both the due process and equal protection clauses of the Federal

Constitution. *Fein v. Permanente Medical Group*, 695 P.2d 665 (1985).

Justice White, in dissenting from the Court's decision to dismiss the appeal, indicated that there was a division among the states regarding the constitutionality of damage limits in medical malpractice actions. Justice White believed that one reason for this division was this Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). In *Duke Power Co.*, this Court addressed the Price-Anderson Act, 42 U.S.C. §2210, which placed a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. In his dissent in *Fein*, Justice White focused on a portion of the Court's decision in *Duke Power Co.*, to wit:

> It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here. . . .

Fein, 474 U.S. at 894 (quoting *Duke Power Co.*, 438 U.S. at 88).

Justice White noted that this discussion by the Court was in response to a claim

that the limitation of liability violated due process by failing to provide those injured by a nuclear accident with an adequate *quid pro quo* for the common law right of recovery displaced by the act. Justice White then stated:

> Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.

Fein, 474 U.S. at 894-895.

Although the Petitioners appear to argue that it was both equal protection and due process concerns that motivated Justice White to dissent from the Court's decision to dismiss the appeal in *Fein*, the language of the dissent clearly focuses solely on due process concerns. Further, the Petitioners appear to argue that the due process challenge they have attempted to raise in their Petition for Writ of Certiorari is the same issue as that which Justice White, in his dissenting opinion referred to above, deemed unresolved by the Court. Presumably, the Petitioners seek to have this Court follow the

reasoning and opinion of Justice White in his dissent in *Fein* and grant the Petition for Writ of Certiorari in this action.

As noted above, the Petitioners failed to properly raise their due process challenge in the Missouri Supreme Court, and the Missouri Supreme Court failed to expressly pass upon this question. As a result, this Court, whether or not it might otherwise find it appropriate to address this federal question that it has previously declined to address, simply lacks the jurisdiction to do so. As a result, Justice White's dissent in *Fein* provides no support for Petitioners' argument that this Court should grant their Petition for Writ of Certiorari.

This Respondent asserts that there has been no significant change since this Court rendered its decision to dismiss the appeal in *Fein*. Consequently, this Court should similarly deny the Petition for Writ of Certiorari filed herein.

III. THE DECISION OF THE MISSOURI SUPREME COURT IS CONSISTENT WITH DECISIONS THAT HAVE BEEN RENDERED BY THE UNITED STATES COURTS OF APPEALS.

The Petitioners suggest that there is a split of authority among state and federal courts on the issue of the

constitutionality of statutes which limit recovery of noneconomic damages in medical malpractice actions. However, the Petitioners fail to cite a single case decided by a United States Court of Appeals where a similar statute has been found unconstitutional because it violated either the Equal Protection or the Due Process Clause of the Fourteenth Amendment. In fact, the various federal courts of appeals that have addressed the issue have found that statutes which limit recovery of damages in medical malpractice actions **do not** violate the Due Process or Equal Protection Clause of the Fourteenth Amendment. *See, Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

The decision of the Missouri Supreme Court below is consistent with the United States Courts of Appeals decisions above-referenced. As a result of this consistency, review by this Court of the Missouri Supreme Court's decision is not warranted.

IV. THE DECISION OF THE MISSOURI SUPREME COURT IS CONSISTENT WITH DECISIONS OF THIS COURT.

The Petitioners contend that the Due Process Clause of the Fourteenth Amendment requires a *quid pro quo* for the displacement of a common law remedy. As noted above, the Missouri Supreme Court did not expressly pass upon this issue because such issue was not properly raised by the Petitioners. However, if such issue had been raised and specifically addressed and rejected by the Missouri Supreme Court, such decision would have been consistent with prior Missouri appellate decisions as well as decisions of this Court.

In *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988), the Missouri Supreme Court upheld the constitutionality of Missouri's statute prohibiting dram shop liability unless the liquor licensee is convicted of selling alcohol to a person obviously intoxicated or a minor. In upholding this statute, the Court quoted from *Holder v. Elms Hotel Co.*, 338 Mo. 857, 866, 92 S.W.2d 620, 624 (1936), to wit:

> "The constitution does not forbid the creation of new rights, or the abolition of old ones recognized by

> the common law, to attain a permissible legislative objective." *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 58, 74 L.Ed. 221, 65 A.L.R. 939 [1929]. . . ."It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common law remedies."

Simpson, 749 S.W.2d at 390.

The Petitioners suggest that this Court has "strongly suggested" that the Due Process Clause of the Fourteenth Amendment requires a *quid pro quo* for the common law remedy restricted by the Missouri statute in question. In support of this argument, the Petitioners cite *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) and *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917). In fact, these decisions do not support Petitioners' argument.

In *Duke Power Co.*, this Court upheld the constitutionality of provisions of the Price Anderson Act, 42 U.S.C. §2210, which placed a dollar limit on total liability incurred by a defendant in the event of a nuclear accident. One of the arguments

raised in that case was that the liability-limiting provisions violated due process because they did not provide an adequate *quid pro quo* for the common law right of recovery which the Act restricted. In response to this argument, this Court stated:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.

Id. at 88.

This Court went on to state that the issue need not be resolved in that case because the act in question did provide a reasonably just substitute for the common law or state tort law remedy it replaced. *Id.* However, the language of the Opinion clearly indicates that the Court doubted that the due process clause gives rise to any such *quid pro quo* requirement.

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). The

> "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). See also, *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-422 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, *e.g.*, *Silver v. Silver, supra* (automobile guest statute); *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883) (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel). Cf. *Thomason v. Sanchez*, 539 F.2d 955 (CA3 1976) (Federal Driver's Act).

438 U.S. at 88 n. 32.

Interestingly, the statute in question in *Silver v. Silver*, 280 U.S. 117 (1929),

cited in the footnote above, was a Connecticut statute which provided that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by his negligent operation. The Supreme Court stated:

> We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. (Citations omitted.) Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. **Its wisdom is not the concern of courts.**

Id. at 122-123 (emphasis added).

The Petitioners attempt to take language from the *Duke Power Co.* case, which is dictum, out of context and attempt to use such dictum in support of their argument that the Court should grant their Petition for Writ of Certiorari. However, it is clear that the due process argument sought to be raised by the Petitioners in this Court is not supported by this Court's decision in *Duke Power Co.* As a result, even if Petitioners' due process argument had been properly raised and expressly passed upon by the Missouri Supreme Court adversely to the Petitioners, such decision would be consistent with this Court's decision in *Duke Power Co.* and subsequent federal courts of appeals decisions. *See, Davis v. Omitowoju*, 833 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

V. THIS COURT IS WITHOUT JURISDICTION TO ADDRESS PETITIONERS' ARGUMENT THAT STATUTORY CAPS ON NONECONOMIC DAMAGES RECOVERABLE BY MEDICAL MALPRACTICE PLAINTIFFS ARE ARBITRARY AND CAPRICIOUS IN VIOLATION OF DUE PROCESS.

The Petitioners attempt to raise the federal question that Mo. Rev. Stat. §538.210.1 violates due process because it is arbitrary and capricious. This respondent has previously demonstrated that Petitioners failed to properly raise the due process federal question in the Missouri Supreme Court and that the court failed to expressly pass upon such issue. Consequently, the Petitioners have similarly failed to properly raise in the Missouri Supreme Court and the court similarly failed to expressly pass upon Petitioners' due process argument that the statute in question is arbitrary and capricious. As a result, this Court lacks jurisdiction to consider this federal question.

In addition, the Petitioners fail to cite any authority in their Petition for Writ of Certiorari where a federal or state court has held a statute similar to Mo. Rev. Stat. §538.210.1 violates the due process clause of the Fourteenth Amendment

on the basis that such statute was arbitrary and capricious. It should be noted that the Missouri Supreme Court specifically found that the statute in question was a "rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams v. Children's Mercy Hospital*, 832 S.W.2d at 904.

As a result, this Court should decline to review this federal question.

VI. THE MISSOURI SUPREME COURT GAVE FULL AND CAREFUL CONSIDERATION TO THE EQUAL PROTECTION ISSUE AND DECIDED SUCH ISSUE CORRECTLY.

The Missouri Supreme Court, in addressing the equal protection issue, determined that Chapter 538 R.S.Mo. neither impinged upon a fundamental right nor did it create a suspect classification. Consequently, the Court correctly determined that the statute must be upheld if rationally related to a legitimate state interest. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 903 (Mo. banc 1992).

This Court has determined that for the purpose of equal protection analysis, a fundamental right is a right "explicitly or implicitly guaranteed by the

Constitution." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972). This Court has also determined that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio School Dist.*, 411 U.S. at 28).

The findings of the Missouri Supreme Court that Chapter 538 R.S.Mo. neither impinges upon a fundamental right nor creates a suspect classification are consistent with United States Courts of Appeals decisions which have found that the right to sue for personal injuries and recover tort damages is not a fundamental right and that victims of medical malpractice are not a suspect class. *See, Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431, 1436 (9th Cir. 1985).

The Missouri Supreme Court correctly noted in its Opinion that "[r]ational basis review is minimal in nature." *Adams*, 832 S.W.2d at 903. This Court has noted that the rational basis test employs

a "relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 314.

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-426 (1961) (citations omitted).

This Court has determined that parties challenging legislation under the equal

protection clause "cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'" *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153-154 (1938)). In the present case, the Missouri Supreme Court considered the "array of evidence" offered by both sides and determined that "the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams*, 832 S.W.2d at 904. Clearly this decision is consistent with the principles set forth in the decisions of this Court and constitutes a careful consideration by the Missouri Supreme Court of the equal protection issue and a correct decision of such issue. As a result, this Court should deny the Petition for Review.

VII. THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Mo. Rev. Stat. §538.210.1 does not bar victims of medical malpractice from seeking redress for damages caused by medical malpractice. In fact, this statute in no way affects a plaintiff's right to seek economic and punitive damages against a negligent health care provider. The statute merely limits the amount of noneconomic damages that may be recovered in a medical malpractice action. Even with this limit, the noneconomic damages allowed in the present case were $860,000.00.

As noted above, the issues Petitioners are attempting to present to this Court do not involve fundamental rights. Instead, courts have generally viewed restrictions on personal injury tort rights as a valid exercise of economic or social welfare regulation. *Boyd v. Bulala*, 877 F.2d at 1196 (citing *Duke Power*, 438 U.S. 59).

It is clear from the Petitioners' "Appellants' Brief" filed with the Missouri Supreme Court that the emphasis of their appeal with the Court was their constitutional challenges under the Missouri Constitution. This is evidenced

by the fact that only approximately one page of the "Appellants' Brief" is devoted to the constitutional challenge based on the United States Constitution. This is understandable given that the United States Courts of Appeals have uniformly rejected similar equal protection and due process challenges, and the only precedent supporting Petitioners' arguments are found in select state court decisions.

CONCLUSION

This Court lacks jurisdiction to address Petitioners' due process federal question. Further, it is clear that the Missouri Supreme Court correctly addressed and decided the equal protection issue, and this decision is consistent with Federal Courts of Appeals decisions which have upheld the constitutionality of statutes similar to the Missouri statute challenged herein. This Respondent contends that no substantial federal question is present in this case and as a result, this Respondent

respectfully requests that the Court enter its order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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INDEX TO APPENDICES

APPENDIX A Page

Missouri Supreme Court
Appellants' Brief, pp. 90-91,
Adams v. The Children's Mercy Hospital, 832 S.W.2d 898
(Mo. 1992) 1a

APPENDIX A

II. THE TRIAL COURT ERRED BY OVERRULING PLAINTIFFS' MOTION TO MODIFY JUDGMENT OR, ALTERNATIVELY, FOR NEW TRIAL BECAUSE THE JUDGMENT ENTRY OF MARCH 15, 1991 IS UNLAWFUL IN THAT THE CHALLENGED LEGISLATION VIOLATES SPECIFIC PROVISIONS OF THE UNITED STATES CONSTITUTION WHICH ARE (A) DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT, (B) EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, (C) RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT AND (D) THE SEPARATION OF POWERS CLAUSES

Due process of law under the United States Constitution means that a person has an opportunity to be heard at a meaningful time and in a meaningful manner. **McGowan v. Maryland, 366 U.S. 420, 426 (1961).** The Fourteenth Amendment to the United States Constitution guarantees equal protection under the law and due process of law.

That Amendment provides that:

> ... nor shall any State... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Bill of Rights. There is some authority that the United States Supreme Court recognizes a constitutional right of access to the courts applicable to the state through the Fourteenth Amendment. **Boddie v. Connecticut, 401 U.S. 371, 380-381 (1971).** In the cited case, the State of Connecticut sought to impose court fees to indigent persons seeking a divorce. The United States Supreme Court held that such court fees unconstitutionally denied such persons the right of access to the courts and are violative of due process. **Id.**

Appellants' right to Equal Protection and right to trial by jury under the U.S. Constitution also are violated by the challenged provisions of Chapter 538, as well as the federal Separation of Powers clauses. In **Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803),** Chief Justice Marshall stated that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he

receives an injury. <u>One of the first duties of government is to afford that protection</u>.

(Emphasis added).

Supreme Court, U.S.
FILED
OCT 26 1992
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No. 92-533

In The

Supreme Court of the United States

October Term, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Missouri

RESPONDENT THE CHILDREN'S MERCY HOSPITAL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to issue a writ of *certiorari*, pursuant to 28 U.S.C. § 1257, when the specific constitutional questions at issue were not presented to the state court below, in a timely manner, to enable the state court to pass on those questions?

2. Is a substantial federal question presented by the Petition for Writ of *Certiorari* in light of the fact that this Court has refused to review similar statutes from other states limiting damage awards in medical negligence cases on the grounds that no substantial federal question was presented thereby?

3. Is the Due Process Clause of the Fourteenth Amendment violated by a state statute which merely modifies, but does not abrogate, a common law cause of action?

4. Is the Equal Protection Clause of the Fourteenth Amendment violated by a state statute which, in limiting recovery of noneconomic damages in medical malpractice actions, neither impacts a suspect class nor impairs a fundamental right?

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are as indicated in the caption of the Petition for Writ of *Certiorari*, with the exception of Suzanna Roushar, R.N., and Cynthia Dooley, R.N. Petitioners have listed Ms. Roushar and Ms. Dooley as parties although they did not participate in the appeal in the Missouri Supreme Court below.

Both Ms. Roushar and Ms. Dooley received verdicts in their favor in the trial of this cause. Petitioners, plaintiffs below, did not preserve any claim of error as to either of those defendant's verdicts. The time for preserving any such claim of error for appeal has long since passed. Neither Ms. Roushar nor Ms. Dooley joined in the hospital's appeal in the Missouri Court of Appeals. Therefore, they are not parties to this appeal and are no longer parties to this action.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. A WRIT OF CERTIORARI SHOULD BE DENIED DUE TO PETITIONERS' FAILURE TO RAISE THEIR CONSTITUTIONAL CHALLENGE IN A TIMELY MANNER SO IT COULD BE PASSED UPON BY THE STATE COURT... 5

II. A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED BY THIS PETITION..... 8

III. SECTION 538.210 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 13

A. The Due Process Clause of the Fourteenth Amendment Does Not Prohibit a State Legislature From Modifying the Common Law..... 13

B. Due Process Does Not Require a Quid Pro Quo or Reasonably Just Substitute When Modifying a Rule of Common Law 15

C. Section 538.210 Is Not Arbitrary or Capricious 17

IV. SECTION 538.210.1 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 19

TABLE OF CONTENTS – Continued

Page

A. A Statute That Applies a Cap to Noneconomic Damages Applicable Only in Medical Malpractice Lawsuits Does Not Impact a Suspect Class or Impair a Fundamental Right 19

B. The Cap Is Rationally Related to a Legitimate Governmental Objective 21

C. Heightened Scrutiny Is Inapplicable, Nevertheless the Cap Provision Survives Its Application 23

D. There Is No Split of Authority Among the Federal Courts Regarding the Validity of Statutory Caps on Noneconomic Damages in Medical Malpractice Cases 25

CONCLUSION 27

APPENDIX A

Motion to Bar Enforcement of Chapter 538 with Suggestions in Support 1a

APPENDIX B

Statistical Data on Claims in Missouri, 1983-90 ... 24a

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. 1992) 18

Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) 26

Baptist Hospital of Southwest Texas, Inc. v. Baber, 672 S.W.2d 296 (Tex. App. 1984) 23

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 22, 25

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989) 5

Cardinale v. Louisiana, 394 U.S. 437 (1969) 8

Clark v. Jeter, 486 U.S. 456 (1988)..... 24

Craig v. Boren, 429 U.S. 190 (1976) 24

Davis v. Omitowoju, 833 F.2d 1155 (3rd Cir. 1989) .21, 25

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) ..... *passim*

English v. New England Medical Center, Inc., 541 N.E.2d 329 (Mass. 1989), *cert. denied*, 492 U.S. 1056 (1990).....8, 11

Erie R.R. v. Tompkins, 304 U.S. 64 (1938)..... 12

Etheridge v. Medical Center Hospitals, 376 S.E.2d 525 (Va. 1989) 22, 25

Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985) 8, 10, 11, 21, 25

Ferguson v. Skrupa, 372 U.S. 726 (1963) 14, 19

TABLE OF AUTHORITIES – Continued

Page

Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) 25

Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980) 25

Jones v. State Board of Medicine, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977) 8, 9, 26

Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment Association, 805 S.W.2d 173 (Mo. banc 1991) 2, 5

Lucas v. United States, 807 F.2d 412 (5th Cir. 1986) 13, 21, 23, 25

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 19, 20

McGowan v. Maryland, 366 U.S. 420 (1961) 20

McGuire v. C&L Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984) 26

Meech v. Hilhaven West, Inc., 776 P.2d 488 (Mont. 1989) 26

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1979) 22

Missouri Pacific R. Co. v. Humes, 115 U.S. 512 (1885) .14, 15

Mobile, J & K R Co. v. Turnipseed, 219 U.S. 39 (1910) 17

Mondou v. New York, New Haven and Hartford R.R. Co., 223 U.S. 1 (1911) 13

New York Central Railroad Co. v. White, 243 U.S. 188 (1916) 13, 15, 16

Pendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977) .17, 25

TABLE OF AUTHORITIES – Continued

Page

Pfost v. Montana, 713 P.2d 495 (Mont. 1985) 26

Plyler v. Doe, 457 U.S. 202 (1982)..... 24

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 15

Romero v. J&J Tire, JMH, Inc., 777 P.2d 292 (Mont. 1989)..... 26

San Antonio School District v. Rodriquez, 411 U.S. 1 (1973) 20

Securities Acceptance Corp. v. Hill, 326 S.W.2d 65 (Mo. 1959) 5

Sibley v. Board of Supervisors of Louisiana State University, 462 So.2d 149 (La. 1985) 25

Silver v. Silver, 280 U.S. 121 (1929) 17

Sproles v. Binford, 286 U.S. 374 (1932)..... 19

United States v. Carolene Products Co., 304 U.S. 144 (1938) 21

Usery v. Turner Elkorn Mining, 428 U.S. 1 (1976) 14

Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1988)..... 23

Watson v. Buck, 313 U.S. 387 (1940).....14, 18

Webb v. Webb, 451 U.S. 493 (1981).....6, 7

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 19, 24

West Coast Hotel v. Parish, 300 U.S. 379 (1936)..... 18

TABLE OF AUTHORITIES – Continued

Page

West v. Louisiana, 194 U.S. 258 (1903) 14

Wright v. Central DuPage Hospital Association, 347 N.E.2d 736 (Ill. 1976) 23

STATUTES AND CONSTITUTION

28 U.S.C. § 1257 ..... 6, 8

28 U.S.C. § 1257(a) 3, 22, 27

Cal. Civ. Code § 3333.1 11

Cal. Civ. Code § 3333.2 10

Idaho Code § 39-4204 9

Idaho Code § 39-4205 9

Idaho Code § 39-4210 10

Mass. Gen. L. ch. 231, § 85K 11

Mo. Rev. Stat. § 1.010 (1986) 14

Mo. Rev. Stat. § 538.210 (1986) ..... *passim*

Mo Rev. Stat. § 538.230 (1986) 1, 2

Mo. Rev. Stat. §§ 538.205-538.235 (1986) 16

U.S. CONST. amend. X 13

STATEMENT OF THE CASE

Respondent The Children's Mercy Hospital has reviewed the Statement of the Case in the Petition for Writ of *Certiorari* and takes issue with some of petitioners' assertions:

First, petitioners contend, at page 4 of their petition, that the jury award to Nicole Adams of $13,905,000.00 for noneconomic damages was reduced to $860,000, "a decrease of $13,045,000.00," by virtue of the "capping" provisions of § 538.210.1.[1] That statement is inaccurate.

Petitioner Nicole Adams' award of $13,905,000.00 was first reduced by 62%, which represented that share of the total fault which the jury apportioned to persons who had been released by plaintiffs prior to trial, by virtue of the operation of § 538.230.[2] Therefore, Nicole Adams' award of noneconomic damages was first reduced from $13,905,000.00 to $5,283,900.00.[3] Thereafter, by virtue of

---

[1] All statutory cites are to Missouri Revised Statutes (Mo. Rev. Stat.) unless otherwise indicated.

[2] Petitioners have abandoned any constitutional challenge to the validity of this statute. Petition for Writ, page 5. Section 538.230 provides, in pertinent part:

> . . . the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

[3] This figure represents 38% of the total award of non-economic damages to Nicole Adams.

the capping provisions of § 538.210, the award of non-economic damages was further reduced to $860,000.[4]

Second, petitioners recite, in footnote 2 on page 4 of their petition, that defendants "opted" to assess fault to released parties and therefore prior settlements worth $5,505,779.00 were not applicable to the entry of judgment. This is also inaccurate. The amounts of prior settlements were not applicable to the entry of judgment, not because of any "option" exercised by defendants, but again by virtue of the operation of § 538.230.

Finally, petitioners also claim, at page 4 of their petition, that the federal constitutional questions were timely raised at every stage of the proceedings. Respondents disagree. The statutes in question were enacted in 1986. Petitioners' cause of action arose on March 30, 1988, more than two years later. Petitioners filed their original petition on September 15, 1989. The case went to trial on February 11, 1991. Petitioners did not first raise any objection to the constitutional validity of any section of Chapter 538 until February 5, 1991,[5] less than a week before trial.

Missouri law requires that constitutional challenges be raised at the earliest opportunity that "good pleading" permits.[6] Respondents respectfully suggest that petitioners' constitutional challenge was not timely.

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[4] The maximum "cap" amount of $430,000, multiplied by two defendants.

[5] When petitioners filed their Motion to Bar Enforcement of Chapter 538.

[6] *Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment Association*, 805 S.W.2d 173, 176 (Mo. banc 1991).

Additionally, petitioners never raised the issue of whether the Due Process Clause of the Fourteenth Amendment requires a *"quid pro quo"* in return for a modification of the common law in either the trial court or the Missouri Supreme Court. Petitioners have raised that issue in their petition for the first time.

REASONS FOR DENYING THE WRIT

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The sole issue presented here is the constitutionality of the "capping" provisions of § 538.210 in light of the Due Process and Equal Protection clauses of the Fourteenth Amendment.[7] Petitioners have not raised their constitutional challenges in a specific and timely manner. They first made a general objection to the constitutional validity of Chapter 538 as violating their rights to due process and equal protection under the "Bill of Rights."[8] Petitioners first raised the specific question of whether the Fourteenth Amendment's guarantee of due process required the legislature to provide a *"quid pro quo"* in return for a modification of the common law in their petition for writ of *certiorari*. Therefore, the Missouri Supreme Court did not have an opportunity to pass on this specific issue. Because the issues now presented by petitioners are untimely, the writ should be denied.

---

[7] Petition for Writ, page 5.

[8] Petitioners' Motion to Bar Enforcement of Chapter 538 with Suggestions In Support, Appendix A.

The analysis which this Court employs to determine whether a statute violates either the Due Process or Equal Protection clauses of the Fourteenth Amendment has been clearly delineated in prior opinions, leaving no room for any genuine question about the constitutional validity of this statute. The very same issues raised in the petition for writ have been urged upon this Court in the past, and this Court has repeatedly found that these issues do not present a substantial federal question.

Because no person has a vested property interest in any rule of common law, the legislature's modification of the common law does not amount to a "taking" so as to infringe upon any person's right to due process. And a statute which merely modifies a common law cause of action, but does not completely abrogate or replace it, need not provide a *quid pro quo* to avoid constitutional infirmity.

Furthermore, a statute which limits recovery of non-economic damages in medical malpractice actions neither impacts a suspect class nor impairs a fundamental right, and therefore the legislature need only have had a rational basis for the enactment to avoid violation of the Equal Protection Clause of the Fourteenth Amendment.

As none of the provisions of § 538.210 are repugnant to the Constitution, *certiorari* should be denied.

I. A WRIT OF CERTIORARI SHOULD BE DENIED DUE TO PETITIONERS' FAILURE TO RAISE THEIR CONSTITUTIONAL CHALLENGE IN A TIMELY MANNER SO IT COULD BE PASSED UPON BY THE STATE COURT

Respondents respectfully urge this Court to deny the requested writ of *certiorari* because the petitioners failed to raise their constitutional challenges in a timely manner under Missouri law, and thereby deprived the Missouri Supreme Court of the opportunity to pass on the issue petitioners now press upon this Court. Petitioners did not urge the unconstitutionality of any provision of Chapter 538 in the proceedings below until filing their Motion to Bar Enforcement of Chapter 538 just six days before trial. Nonetheless, the disputed statute had been in existence for two years before petitioners' cause of action had accrued, and for five years by the time petitioners first raised any objection to it. Raising constitutional questions in this manner failed to satisfy clear and fundamental requirements of Missouri law:

> It is firmly established that a constitutional question must be presented *at the earliest possible moment "that good pleading* and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived."

Callier v. Director of Revenue, 780 S.W.2d 639, 641 (Mo. banc 1989) (emphasis added) (*quoting Securities Acceptance Corp. v. Hill,* 326 S.W.2d 65, 66 (Mo. 1959)). *See also Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment Association,* 805 S.W.2d 173, 176 (Mo. banc 1991).

In addition, the petitioners never raised the issue of whether the Fourteenth Amendment's guarantee of due process required a state legislature to provide a *"quid pro quo"* when modifying the common law at any stage of the proceedings below.[9]

This Court has repeatedly held that *certiorari* should be denied in instances where a constitutional issue is raised for the first time with this Court, without having given the state court below the opportunity to pass upon the issue. *Webb v. Webb*, 451 U.S. 493 (1981). In *Webb*, this Court dismissed a writ of *certiorari* for want of jurisdiction after it determined that the question presented by petitioner – whether a Georgia court was required by Article IV of the United States Constitution to give "full faith and credit" to the judgment of a Florida court in a child custody dispute – had not been raised in the Georgia Supreme Court below.

In reaching its decision, this Court commented:

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257 . . . that statute requires that in state courts petitioner have *"specially set up or claimed* under the Constitution . . . of . . . the United States" *that right which she now seeks to enforce* . . . Similarly our Rule . . . requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and

---

[9] Petitioners did not raise the *"quid pro quo"* argument under the 14th Amendment in the pre-trial Motion to Bar Enforcement of Chapter 538, nor in the post-trial Motion to Modify Judgment, nor in their appeal to the Missouri Supreme Court.

> in the appellate court, at which *the federal questions sought to be reviewed* were raised; the method or manner of raising them and the way in which they were passed upon by the court."

Id. at 495 (emphasis added).

The federal questions which petitioners herein now seek to have reviewed by this Court are (1) whether the Due Process Clause permits "caps" on recoveries without any *quid pro quo,* and (2) whether the Equal Protection Clause prohibits a statute which discriminates against plaintiffs in medical negligence cases, and further creates "a discriminatory subclass of persons within the class of medical malpractice victims."[10] Neither of these precise questions were "specially set up or claimed" as mandated by the holding of *Webb:*

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

451 U.S. at 496-497.

Following well-established precedent, developed over the years with an eye toward comity between the states and the federal government, this Court held in *Webb:*

> Citing a long history of cases, . . . "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."

---

[10] Petition for Writ, pp. (i), 26.

Id. at 499 (*quoting Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)).

In light of *Webb*, respondent respectfully suggests that the Court lacks jurisdiction under 28 U.S.C. § 1257 to review this case, and the writ of *certiorari* should be denied.

II. A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED BY THIS PETITION

A substantial federal question, warranting this Court's review, is not presented by this petition. In fact, this Court has refused to review the constitutionality of similar medical malpractice reform legislation or "capping" statutes from other states on at least three separate occasions in recent years. *Jones v. State Board of Medicine*, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985); and *English v. New England Medical Center, Inc.*, 541 N.E.2d 329 (Mass. 1989), *cert. denied*, 493 U.S. 1056 (1990). The "capping" statute upon which petitioners seek review in the instant case is a less restrictive modification of state common law than those statutory provisions in the cases cited above where this Court determined no substantial federal question was presented.

In the instant case, petitioners seek review of only one statutory section of Chapter 538, specifically § 538.210, which sets a cap on noneconomic damages

only,[11] which cap is adjusted annually to account for inflation.[12] That statute imposes no limits whatsoever on a plaintiff's recovery of economic or pecuniary damages, nor does that statute otherwise limit a plaintiff's remedies or theories of recovery.

However, in *Jones*, the Idaho Legislature enacted statutes which placed limitations on both recoveries *and remedies* in medical malpractice actions. Those statutes included across-the-board caps[13] on any recovery against physicians and hospitals of $150,000 per claim and $300,000 per occurrence.[14]

The Idaho enactment also limited the grounds upon which a medical malpractice action could be brought to only those of common law negligence, and required that recovery should be restricted to "compensatory damages", and then only those compensatory damages not

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[11] § 538.210.1

[12] § 538.210.4. This inflation adjustment feature has resulted in the cap being increased each year since its inception in 1986. The cap has been adjusted as follows:

1986 – $350,000
1987 – $356,000
1988 – $373,000
1989 – $391,000
1990 – $401,000
1991 – $430,000
1992 – $446,000

[13] On both noneconomic and economic damages. Idaho Code § 39-4204, 39-4205.

[14] In the case of hospitals, the cap may, in certain circumstances, be calculated to be an amount equal to the number of beds in the hospital, multiplied by $10,000. Idaho Code § 39-4205.

already satisfied from collateral sources.[15] The Idaho Supreme Court, in *Jones*, noted parenthetically that the term "compensatory damages" was intended to exclude punitive damages.[16]

Clearly, the limitations imposed on medical malpractice actions by the Idaho statutes are far more onerous than Missouri's partial cap. Missouri's statute does not impose an across-the-board cap on all damages, but only on noneconomic damages. There is no limit under § 538.210 to economic or pecuniary damages. Furthermore, Missouri's statute does not alter the traditional "collateral source" rule, nor does it prohibit punitive damages.[17]

And equally clearly, if this Court denied *certiorari* to petitioners in *Jones* due to the absence of a substantial federal question, there cannot be a more compelling federal question presented by the less restrictive regulation of the Missouri statute in question here.

The California statutes in question in *Fein*, could also be considered more restrictive than the Missouri regulation in question here. In addition to limiting the amount of noneconomic damages that a plaintiff can recover to a total of $250,000,[18] the California statute also modified the "collateral source" rule to allow a defendant, at his

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[15] Idaho Code § 39-4210.

[16] 555 P.2d at 402.

[17] Section 538.210.5 expressly provides for awards of punitive damages under appropriate circumstances.

[18] Cal. Civ. Code § 3333.2. **Note:** Missouri's cap is "per defendant," not per occurrence like California's.

option, to introduce evidence of benefits received or available to the plaintiff from various collateral sources.[19]

Again, the California statutes are more restrictive than the Missouri model. Missouri's cap is flexible, both in terms of annual adjustments for inflation and the number of parties in the case, all of which inures to the benefit of the injured patient.

In *Fein*, this Court initially granted *certiorari* and then later dismissed plaintiff's appeal "for want of a substantial federal question." 474 U.S. 892. If this Court found the challenge to California's regulation devoid of a substantial federal question, surely the Court is of like mind regarding Missouri's.

In the most recent case where this issue has been urged on this Court, *English v. New England Medical Center, Inc.*, a jury awarded an injured patient $350,000, which was promptly reduced to $20,000 by virtue of a Massachusetts statute[20] which limited the liability of charitable institutions to only $20,000. The Massachusetts Supreme Court upheld that statutory limitation against constitutional attack and this Court denied *certiorari*. 493 U.S. 1056 (1990). Undeniably, Massachusetts' cap of $20,000 is more onerous than Missouri's partial cap.

Therefore, as recently as two years ago, this Court determined that constitutional challenges advanced by

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[19] In return, plaintiffs in California are allowed, at their option, to introduce evidence of the cost to them of securing such payments (i.e. disability insurance premiums). Cal. Civ. Code § 3333.1.

[20] Mass. Gen. L. ch. 231, § 85K.

aggrieved plaintiffs against similar but more restrictive "capping" legislation from other states do not present a substantial federal question. Respondent respectfully suggests that the grounds stated in the instant petition for writ of *certiorari* are no more compelling, and should not be treated any differently by this Court than the above-cited requests for review.

Historically, this Court has been reluctant to involve itself in matters which are traditionally the exclusive province of the states. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), this Court held that federal courts must defer to the "laws of the several states" as substantive rules of decision in the courts of the United States. That landmark decision was grounded in the recognition that:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . . [T]he Constitution of the United States, . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments.

304 U.S. at 78-79.

Because of time-honored notions of Federalism, this Court should deny petitioners' request for review of § 538.210.

III. SECTION 538.210 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Due Process Clause of the Fourteenth Amendment Does Not Prohibit a State Legislature From Modifying the Common Law.

As this Court has clearly stated in the past, the Due Process Clause of the Fourteenth Amendment does not restrict the right of state legislatures to amend, modify or even eliminate the common law of their respective states.[21] This Court has on numerous occasions stated that there is no vested property interest in *any* rule of the common law[22] and that:

> [t]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby.

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88 n.32 (1978).

The proposition that the common law cannot be amended, modified or abolished without violating the

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[21] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[22] *New York Central Railroad Co. v. White*, 243 U.S. 188, 198 (1916); *Mondou v. New York, New Haven and Hartford R.R. Co.*, 223 U.S. 1, 51 (1911). *See also Lucas v. United States*, 807 F.2d 412, 422 (5th Cir. 1986).

Due Process Clause would lead to harsh results considering that the law is not stagnant, but changes and adapts to the times and conditions then present. *West v. Louisiana*, 194 U.S. 258, 262 (1903).

It bears noting that the common law of England was adopted in Missouri by statute,[23] not by constitutional provision. It seems beyond serious argument that what a legislature can enact by statute, it can modify or even repeal by similar legislative enactment.

State laws resolving issues of state concern are presumed constitutional and will be enforced even if the statute is harsh, unjust, or oppressive to some. *Usery v. Turner Elkorn Mining*, 428 U.S. 1, 15 (1976); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 523 (1885).[24] And it is

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[23] Section 1.010 provides:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States . . . are the rule of action and decision in this state . . .

James I ascended to the throne of England in 1603. Surely petitioners do not mean to suggest that any legislative modification of the common law from the way it existed in 1607 gives rise to due process considerations.

[24] It is not upon this Court to determine whether any act within the power of the state legislature is fair or unfair, good or evil. *Watson v. Buck*, 313 U.S. 387, 403 (1940). This United States Supreme Court is not a "super legislature" that questions the state's right to regulate business and industrial conditions within its borders. *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963). For example, in *Missouri Pacific*, this Court upheld a Missouri statute which limited a plaintiff's damages to twice his actual loss. 115 U.S. at 524.

well settled that tort law is a state, not federal, concern. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79 (1980) (Marshall, J., concurring) (cites omitted). It is, therefore, clearly within the province of the state legislature to prescribe limits within which a jury can exercise its discretion in awarding damages,[25] despite any claim to the contrary by petitioners that the exercise of such power is unjust or oppressive.

Respondent admits that Missouri's cap on noneconomic compensatory damages may, in some cases, not fully compensate a plaintiff for his/her noneconomic loss. However, contrary to petitioners' assertions, due process is not violated just because an injured party does not recover as much under a statute which modifies the common law as she would have recovered under the unaltered common law.[26] Moreover, Chapter 538 does not deny petitioners, or any plaintiff, a remedy for a wrong done. Instead, it simply defines the substantive law by *limiting* – not eliminating – the amount of *noneconomic* recovery available. Missouri did not, therefore, violate the Due Process Clause when its legislature adopted Chapter 538.

B. Due Process Does Not Require a Quid Pro Quo or Reasonably Just Substitute When Modifying a Rule of Common Law.

The petitioners argue that the Due Process Clause of the Fourteenth Amendment requires a *quid pro quo* or

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[25] *Missouri Pacific*, 115 U.S. at 524.

[26] *Duke Power*, 438 U.S. at 93; *New York Central R.R. Co.*, 243 U.S. at 201.

reasonably just substitute in order for the Missouri General Assembly to "displace" or "abolish" a common law right. However, neither case cited by petitioners, *Duke Power* nor *New York Central,* holds that a *quid pro quo* or reasonably just substitute is required. Rather, in *Duke Power* this Court stated:

> [I]t is *not at all clear* that the due process clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.

Duke Power, 438 U.S. at 88 (emphasis added); *see also New York Central,* 243 U.S. at 201.

And both *Duke Power* and *New York Central* are distinguishable from the instant case. *Duke Power* involved a congressional enactment which abolished the right to sue nuclear power plant operators at common law; *New York Central* involved the complete abrogation of an injured worker's right to sue his employer for a job-related injury.

It should be noted that §§ 538.205-538.235 do not "abolish" any common law cause of action. Nor do they, as in *Duke Power* and *New York Central,* "set aside one body of rules only to establish another system in its place."[27] Chapter 538 only *modifies* the common law. And as previously noted, no person has a vested property interest in any rule of the common law. The Missouri General Assembly was thus within its power to limit the

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[27] *New York Central,* 243 U.S. at 201.

dollar amount of noneconomic compensatory damages without a *quid pro quo*.

In fact, it is arguable a state legislature could completely abolish a common law right without a *quid pro quo*.[28] In *Silver v. Silver*, 280 U.S. 121, 122 (1929), this Court upheld a newly enacted Connecticut "guest" statute which *abolished* an individual's right to proceed against the driver of an automobile. Likewise, in *Mobile, J & K R Co. v. Turnipseed*, 219 U.S. 39, 40 (1910), Mississippi's abrogation of the common law "fellow servant" doctrine, as applied to employees of railroad corporations, was upheld. Neither statute established a *quid pro quo* and yet both were upheld.

C. Section 538.210 Is Not Arbitrary or Capricious.

Petitioners further argue that § 538.210 violates substantive due process because it is arbitrary, capricious and irrational. The petitioners in *Duke Power* likewise argued that the cap imposed by the Price-Anderson Act was arbitrary and capricious. In rejecting this same argument there, this Court noted:

> [C]andor requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This

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[28] Other courts have held that a *quid pro quo* is not required to abolish a common law right. *See Pendergast v. Nelson*, 256 N.W.2d 657, 671 (Neb. 1977) ("There is no merit to the argument that if a common law right is to be taken away something must be given in return.").

> is not, however, the kind of arbitrariness which flaws otherwise constitutional action.

Duke Power, 438 U.S. at 86.

The dollar amount selected in § 538.210.1, like the cap chosen by Congress in the Price-Anderson Act, may therefore be characterized as "arbitrary" in the sense that it selects *any* ceiling figure for damages. But under this Court's holding in *Duke Power*, that does not make the statute unconstitutional.

Moreover, the cap does not, as petitioners allege, defy rational explanation. It was enacted by the General Assembly in an attempt to combat what it felt was a developing medical malpractice crisis within the state.[29] The legislature is, and should be, the primary judge of the necessity for an enactment such as this. *See West Coast Hotel v. Parish*, 300 U.S. 379, 398 (1936); *see also Watson v. Buck*, 313 U.S. 387, 403 (1940) (deference given to state legislature).

Finally, the notion that due process authorizes courts to strike down laws they believe were enacted unwisely has long ago been discarded by this Court:

> [The] doctrine . . . that due process authorizes Courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long been discarded. . . . Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit

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[29] *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 904 (Mo. 1992).

> to "subject these states to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (*quoting Sproles v. Binford*, 286 U.S. 374, 388 (1932)).

IV. SECTION 538.210.1 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. A Statute That Applies a Cap to Noneconomic Damages Applicable Only in Medical Malpractice Lawsuits Does Not Impact a Suspect Class or Impair a Fundamental Right.

The first step in addressing any equal protection analysis is to determine whether the challenged classification operates to the disadvantage of a suspect class or impinges upon a fundamental right protected by the Constitution, thereby requiring strict judicial scrutiny. If the classification does not burden a suspect class or impinge upon a fundamental right, the statute will withstand constitutional challenge so long as the classification bears a rational relationship to a legitimate state purpose. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1972).

This Court has identified "suspect" classifications as those based on alienage, ancestry and race. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). On defining a "suspect" class, this Court said:

> A suspect class is "one saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. at 313 (*quoting San Antonio School District v. Rodriquez*, 411 U.S. 1, 28 (1973)). Clearly, plaintiffs in medical negligence lawsuits do not fit this description.

"Fundamental" rights include the right to vote, to travel interstate, to personal privacy and to free speech, as well as other First Amendment protections. *Massachusetts Board*, 427 U.S. at 312 nn. 3-4.

The constitutional guarantee of equal protection is intended to protect against "invidious discrimination." When neither a fundamental right is infringed nor a suspect class impacted, the equal protection safeguard is only offended when a classification "rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Indeed, the state is not required to prove the correctness nor, ultimately, the wisdom of a legislative decision. The state legislature is presumed to have acted within constitutional confines even if, "in practice, their laws result in some inequality." *McGowan*, 366 U.S. at 425.

The issue which this Court would have to decide – if it were to grant *certiorari* in this case – is not whether a cap that distinguishes between medical malpractice torts and other torts will *in fact* ensure the availability of affordable health care in Missouri, but whether in 1986 there was reason for the legislature to believe it would. Equal protection is satisfied if the Missouri General

Assembly could have reasonably anticipated that the cap provision would reduce costs and promote the availability of health care services.[30] The reasonableness of the legislature's purpose in enacting §§ 538.205-538.235 remains at least debatable. Therefore, the equal protection issue must be resolved in the legislature's favor. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

B. The Cap Is Rationally Related to a Legitimate Governmental Objective.

Several jurisdictions have upheld the constitutionality of medical malpractice legislation in the face of equal protection attacks. *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (noneconomic medical malpractice cap was rationally related to the objective of reducing the cost to malpractice defendants and their insurers, and therefore did not violate due process or equal protection); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (noneconomic cap was rationally related to the perceived crisis in the malpractice industry and therefore did not violate due process or equal protection); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989) (statutory noneconomic cap was rationally related to a legislative desire to curb high cost of malpractice insurance and thereby

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[30] In an *amicus curiae* brief filed in the Missouri Supreme Court when petitioners' appeal was being considered there, the Missouri Medical Association cited rather compelling data regarding the *actual* effect the 1986 enactment had had on professional liability insurance premiums in Missouri, which strongly suggested that the "reform" legislation was in fact having the desired effect of decreasing professional liability insurance premiums for health care providers. *See* Appendix B.

promote quality medical care, therefore due process and equal protection were not violated); and *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (statutory cap on total medical malpractice recovery was reasonably related to a valid legislative purpose of maintenance of adequate health care services and therefore did not violate due process or equal protection guarantees).[31]

This Court has found that a statutory limitation on tort recoveries is "a classic example of an economic regulation – a legislative effort to structure and accommodate 'the burdens and benefits of economic life'." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978).

As this Court has noted:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based *could not reasonably be conceived to be true by the governmental decisionmakers.*

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1979) (emphasis added).

In order to justify this Court's issuance of a writ pursuant to 28 U.S.C. § 1257(a), petitioners must demonstrate that the Missouri General Assembly acted in an arbitrary and irrational way in enacting the statute in

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[31] *See also Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989) (total cap on medical malpractice recovery did not violate procedural due process, substantive due process, equal protection or the right to trial by jury).

question. But Missouri's cap is rationally related to the legislature's goal of promoting the availability and affordability of health care services by limiting the high cost of malpractice insurance – and thus, ultimately, the cost of health care to Missouri's citizens as well.

Petitioners cite cases[32] that found no reasonable relationship existed between a statutory cap on damages on the one hand, and the state's interest in reducing malpractice insurance costs and increasing the availability of health care on the other, in an effort to persuade this Court to review Missouri's statute. However, the petitioners' cases have either been subsequently overruled, involve statutes that are too dissimilar to be of use in addressing the constitutionality of Missouri's statute or were decided based upon a provision of a state, not the federal, constitution.[33]

C. Heightened Scrutiny Is Inapplicable, Nevertheless the Cap Provision Survives Its Application.

Petitioners urge this Court to apply "heightened scrutiny" in its analysis of their equal protection claim,

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[32] *See Waggoner v. Gibson*, 647 F. Supp. 1102, 1106 (N.D. Tex. 1988); *Baptist Hospital of Southwest Texas, Inc. v. Baber*, 672 S.W.2d 296, 298 (Tex. App. 1984); *Wright v. Central DuPage Hospital Association*, 347 N.E.2d 736, 741-42 (Ill. 1976).

[33] *Waggoner* was subsequently overruled by the Fifth Circuit in *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986), thus deflating that decision and the Texas state court decision, *Baptist Hospital*, which invalidated the Texas cap on federal equal protection grounds. *Wright* concerned a *total* cap. 347 N.E.2d at 741. In addition, the *Wright* decision was based on a provision of the Illinois Constitution, not on federal equal protection analysis. *Id.* at 743.

even though this Court has repeatedly held that the "rational basis" test governs equal protection analysis if neither a fundamental right nor a suspect classification is involved. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972).

This Court's guidance in determining "quasi-fundamental rights" or "semi-suspect" classes shows that the right to recover for personal injuries is not a right so significant as to warrant heightened scrutiny. This Court has only applied heightened scrutiny in cases of illegitimacy,[34] gender,[35] and alienage.[36] In *Duke Power Co.*, this Court used the "rational basis" test to uphold a federal law capping damages in the event of a nuclear accident. 438 U.S. at 93. Respondent respectfully suggests that application of "heightened scrutiny" to the statute in question would not be warranted.

However, even if this Court were to decide to establish a third category of equal protection analysis, Missouri's cap clearly bears a reasonable and substantial relationship to the legislative objective of controlling costs and maintaining the integrity of Missouri's health care system. Therefore it passes "heightened scrutiny" review.

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[34] *Clark v. Jeter*, 486 U.S. 456 (1988).

[35] *Craig v. Boren*, 429 U.S. 190 (1976).

[36] *Plyler v. Doe*, 457 U.S. 202 (1982).

D. There Is No Split of Authority Among the Federal Courts Regarding the Validity of Statutory Caps on Noneconomic Damages in Medical Malpractice Cases.

Petitioners claim there is a "clear and substantial" split of authority among the federal and state courts as to the constitutionality of statutory caps[37] based on federal equal protection grounds. This is simply not the case. Petitioners could not find even one federal case to support their claim.

All of the federal courts which have considered the constitutionality of reform acts have upheld such acts as constitutional.[38] Similarly, numerous state courts have ruled that these caps are valid under federal equal protection analysis.[39] Petitioners, nevertheless, cite several state court cases invalidating statutory caps on equal protection grounds as "proof" that there is a "clear and substantial split of authority." However, these cases and statutes are either distinguishable from the present case, have

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[37] Petition for Writ, page 5.

[38] *See Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1158-59 (3rd Cir. 1989); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986); and *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985).

[39] *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 533-34 (Va. 1989); *Fein v. Permanente Medical Group*, 695 P.2d 665, 682-83 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985); *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149, 158 (La. 1985), *opinion modified*, 477 So.2d 1094, 1109-10 (La. 1985); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 598-600 (Ind. 1980); *Pendergast v. Nelson*, 256 N.W.2d 657, 668 (Neb. 1977).

been erroneously interpreted by petitioners or have been subsequently overruled.[40]

There is *not* a split among the federal courts regarding the constitutionality of a statute that applies a cap on noneconomic damages applicable only to medical malpractice cases. Petitioners attempt to manufacture a split

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[40] Petitioners' supporting case law is inapplicable and too dissimilar to be of use in addressing the constitutionality of Missouri's cap. Many of the cases petitioners cite address total caps. *See Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *McGuire v. C&L Restaurant, Inc.*, 346 N.W.2d 605, 609, 613 n.10 (Minn. 1984).

Petitioners cite *Jones v. State Board of Medicine*, 55[illegible] P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977). This is erroneous. The Idaho Supreme Court **upheld** the statutory caps against constitutional attack.

Petitioners also claim *Pfost v. Montana*, 713 P.2d 495 (Mont. 1985) supports the use of strict scrutiny because the right to full legal redress is fundamental. *Pfost* also dealt with a total cap. Furthermore, *Pfost* was **overruled** by the Montana Supreme Court in 1989 and is no longer good law or valid precedent. *Romero v. J&J Tire, JMH, Inc.*, 777 P.2d 292, 294 (Mont. 1989) (*citing Meech v. Hilhaven West, Inc.*, 776 P.2d 488, 491 (Mont. 1989)).

In *Meech*, the plaintiff claimed to be denied his *fundamental* right to full legal redress on equal protection grounds. The defendant answered that the Montana Constitution guaranteed only a right of access to courts "to seek a remedy for wrongs *recognized by common law or statutory authority, and the legislature may alter common law causes of action to promote a legitimate state interest.*" *Id.* at 491 (emphasis added). The Montana Supreme Court expressly adopted the defendant's interpretation and overruled *Pfost* insofar as it held that the Montana Constitution guaranteed "a fundamental right to full legal redress." Consequently the *Pfost* court's application of strict scrutiny is no longer valid since *Meech* holds that there is no fundamental right to full legal redress. Montana therefore supports respondent's position, not petitioners'.

by citing state court cases invalidating caps. However, petitioners' supporting case law is inapplicable to Missouri's cap. Those cases have either been overruled, involve statutes too dissimilar to be of use in addressing the constitutionality of Missouri's statute or were based on some provision of another state's constitution. Petitioners have completely failed to demonstrate any genuine split of authority on this issue.

CONCLUSION

Because the provisions of § 538.210.1 are not repugnant to either the Due Process or Equal Protection clauses of the Fourteenth Amendment, this Court's jurisdiction is not properly invoked pursuant to 28 U.S.C. § 1257(a). And because no substantial federal question is presented by the petition for writ of *certiorari*, it should be denied.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,	CASE NO.: CV89-23626
Plaintiffs,	DIVISION: 6
v.	
THE CHILDREN'S MERCY HOSPITAL, et al,	CIVIL DOCKET: "M"
Defendants.	

PLAINTIFFS' MOTION TO BAR THE ENFORCEMENT OF ANY AND ALL PROVISIONS OF V.A.M.S., CHAPTER 538 (TORT ACTIONS BASED ON IMPROPER HEALTH CARE) AS UNCONSTITUTIONAL UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS

COME NOW Plaintiffs, by and through their counsel of record, and move this Court for its Order barring the enforcement of Chapter 538 V.A.M.S. (Tort Actions Based on Improper Health Care) for the reasons set forth herein and in the attached Suggestions in Support expressly incorporated herein by reference:

1. This medical malpractice action is potentially affected by the Medical Malpractice Act passed by the Missouri legislature intending to apply to all causes of

action accruing on or after February 3, 1986 (Chapter 538, V.A.M.S., attached hereto as *"Exhibit A"*).

2.Chapter 538 is unconstitutional under the Missouri and United States Constitutions as denying Plaintiffs herein equal protection under the laws, due process of law, fair and open access to the courts, certain remedy afforded for every injury to person, right of trial by jury, and the constitutional right to one's health and happiness, all as set forth in the attached Suggestions in Support expressly incorporated herein by reference.

3. Using precisely the same analysis as exercised by the Missouri Supreme Court in striking down as unconstitutional the last two (2) attempts by the Missouri legislature to impair the rights of medical malpractice victims, this current medical malpractice legislation should be rendered null and void forthwith as unconstitutionally violative of Plaintiffs' guaranteed rights herein.

WHEREFORE, for the above-stated reasons, Plaintiffs Nicole and Julia Alice Adams respectfully request that this Court enter its Order in this matter as follows:

(a) That Chapter 538, Missouri Revised Statutes (Tort Actions Based on Improper Health Care) is directly violative of the Missouri and Federal Constitutional provisions set forth herein and shall be rendered null and void and of no effect in the trial of this action or beyond; and

(b) For such other and further relief as this Court deems just and proper.

Respectfully submitted,

ROBB & ROBB

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ATTORNEYS FOR
PLAINTIFFS JULIA ALICE
ADAMS AND NICOLE
ADAMS

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage-paid, on this 4th day of February, 1991, to:

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[Petitioners' Exhibit A Omitted in Printing]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,	**CASE NO.: CV89-23626**
Plaintiffs,	**DIVISION: 6**
v.	
THE CHILDREN'S MERCY HOSPITAL, et al,	**CIVIL DOCKET: "M"**
Defendants.	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION TO BAR THE ENFORCEMENT OF ANY AND ALL PROVISIONS OF V.A.M.S, CHAPTER 538 (TORT ACTIONS BASED ON IMPROPER HEALTH CARE) AS UNCONSTITUTIONAL UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS

COME NOW Plaintiffs, by and through their counsel of record, and for their Suggestions in Support of their Motion to Bar the Enforcement of Chapter 538, V.A.M.S. (Tort Actions Based on Improper Health Care) state and allege as follows:

I. FACTUAL BACKGROUND AND PROCEDURAL CONTEXT OF MOTION

This medical malpractice cause of action comes to trial before this Court on February 11, 1991. In that this

cause of action arose on March 30, 1988, it is arguably and potentially affected by a medical malpractice statute passed by the Missouri legislature which, on its face, is intended to apply to all such causes of action accruing on or after February 3, 1986.

Plaintiffs hereby admit and stipulate that their tort action is based on improper health care, but dispute the applicability of Chapter 538 and each of its provisions set forth therein as violating their United States and Missouri constitutional rights to due process of law, open courts, right of trial by jury, and equal rights and opportunities under the law. For the reasons set forth herein, Plaintiffs respectfully request that this Court firmly and unequivocally strike down chapter 538 and render it null and void in any application to the instant case in view of its clear violation of the various constitutional guarantees set forth and applicable herein.

II. AUTHORITY AND ANALYSIS

A number of other states have stricken down similar medical malpractice legislation as violative of their own state constitutional guarantees. ***Montana – Pfost v. Montana,* 713 P.2d 945 (Mont. 1985); *Ohio – Duran v. Suburban Community Hospital,* 482 N.E.2d 1358 (Ohio C.P. 1985); *Washington – Sofie v. Fiberboard Corp.,* 771 P.2d 711 (Wash. 1989); *Texas – Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988); *Virginia – Boyd v. Bulala,* 647 F.Supp. 781 (W.D.Va. 1986); *Florida – Smith v. Department of Insurance,* 507 So.2d 1080 (Fla. 1987).** Our sister state of Kansas struck down in its entirety the Kansas medical malpractice act as unconstitutional in ***Kansas***

Malpractice Victim's Coalition v. Bell, 757 P.2d 251 (Kan. 1988). All of these states have similar constitutional provisions to that found in the Missouri Constitution of 1945, Bill of Rights.

A. This Court Has the Power, Authority, and Duty to Strike Down Chapter 538 as Unconstitutional

It is the duty and responsibility of this Court to strike down and to block the application of any legislative act or statute which is in conflict with the provisions of the Federal or United States Constitution. In 1822, the Supreme Court of Missouri held in *Baily v. Gentry*, 1 Mo. 164, that it was the duty of the court to inquire into the constitutionality of an act of the legislature.

If a statute conflicts with a constitutional provision, that statute "stands for naught" and is void as fully as if it had been specifically repealed. *Pogue v. Swink*, 261 S.W.2d 40 (Mo. 1953); *State ex rel. Goldman v. Hiller*, 278 S.W. 708 (Mo. 1926). Indeed, the Missouri Supreme Court has placed that duty upon all of the courts of the state of Missouri to first and foremost enforce the Constitution and the court held that the courts of the state should "brush aside any statute which conflicts with (the Constitution), whether it was passed before or after the Constitution was adopted." *Kansas City, Fort S & M.R. Co. v. Thornton*, 54 S.W. 445 (Mo. 1899).

The Missouri legislature's last attempt to establish a Chapter 538 affording special rights and privileges to health care providers was stricken down by the Supreme Court of Missouri, en banc, in *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583

S.W.2d 107, 110-11 (Mo.banc 1979). The Court held that the Chapter 538 requirement that malpractice plaintiffs must refer their claim to a professional liability review board before filing their action in court was unconstitutional as depriving plaintiffs a fair right of access to the courts. The Court found that it violated the "open courts" provision of the Missouri Constitution of 1945. *Id.* at 110.

It is most noteworthy for present purposes that it was the ***trial court*** which initially struck Chapter 538 as unconstitutional in ***State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, supra.*** The Honorable Carl R. Gaertner, Judge, Circuit Court of the City of St. Louis, held that Chapter 538 was unconstitutional and overruled the defendant's motion to dismiss on the basis of the plaintiff's failure to comply with the review board requirement.

Under the circumstances of the present action, it remains the duty of the trial court in the first instance to zealously guard the constitutional rights of Missouri citizens.

B. Plaintiffs Assert Standing to Challenge Constitutionality of Chapter 538 In View of the Substantial, Impending and Immediate Invasion of Their Personal Constitutional Rights Which Would Have the Effect of Injuring Them

Plaintiffs herein assert standing to challenge Chapter 538 as unconstitutional in view of the impending injury by its application to them during the trial of their medical negligence case beginning February 11, 1991. Plaintiffs have only one (1) opportunity as a matter of law to

present their case to a jury. As set forth herein, the application of the provisions of Chapter 538 at trial and afterwards would cause severe and irreparable harm to Plaintiffs herein. That harm is real, impending, and substantive, and not illusory, permitting Plaintiffs herein standing to assert that the legislative act at issue is unconstitutional and should be stricken. *Stouffer v. Crawford*, 248 S.W. 581 (Mo. 1923); *State ex rel. Atlantic Horse Insurance Co. v. Blake*, 144 S.W. 1094 (Mo. 1912), *ovrld. on other grnds; Missouri Pacific R. Co. v. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983).

C. Chapter 538, In Its Entirety, Should Be Stricken, or In the Alternative, the Specific Provisions Set Forth Below Should Be Stricken as Violative of the United States and Missouri Constitutions

The medical malpractice statute, Chapter 538, has several provisions which substantially increase the burden of a medical malpractice plaintiff, interfere with their ability to obtain and collect a judgment, and limit the amount of damages obtainable, all of which conflict directly with provisions of the United States and Missouri Constitutions.

1. Chapter 538 Purports to Permit a Medical Malpractice Defendant to Apportion Fault to Non-Parties Pursuant to Section 538.230 – This particular provision of the statute presumably would permit a defendant to apportion fault to persons who are not at the time of trial parties to the litigation. V.A.M.S. 538.230.1. Any other tort

victim, other than those injured by health care providers, need not concern him or herself with defending the actions of persons who are not parties at trial. This arbitrary and capricious provision is directly in conflict with Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States Constitution guaranteeing right to trial by jury, equal protection and due process.

2. **Modification of Joint and Several Liability** – Section 538.230.2 would permit a medical malpractice defendant to escape the rules of joint and several liability applicable in favor of all injured persons, other than those hurt by doctors or hospitals. This section indicates that a malpractice defendant would only be jointly liable with defendants whose apportioned percentage of fault is equal to or less than such defendant. *See* A. Robb, *Missouri's Medical Malpractice Legislation: Handbook, Forms and Jury Instructions* (UMKC/CLE 1986 and 1990 Supp.), p. 21-22.

That being the case, a malpractice plaintiff is faced with the real threat of suffering a substantial, uncollected portion of a verdict due to the application of this provision which is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States constitution guaranteeing right to trial by jury, equal protection and due process.

3. **Itemization of Damages** – Section 538.215 would require that in a lawsuit against a doctor or hospital that the jury must itemize damages as between five (5) distinct categories. Again, any other tort victim need not

have the categories of damages itemized and that provision creates additional burdens of persuasion and proof not to be hazarded by other tort victims. The application of this provision is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States Constitution guaranteeing right to trial by jury, equal protection and due process.

4. **Requirement That Future Damages May Be Payable in Periodic or Installment Payments** – Section 538.220 would require that any future damages be paid in whole or in part in periodic or installment payments should the sum exceed One Hundred Thousand Dollars ($100,000.00). Such provision is onerous and unfair to a malpractice victim and is not to be found applicable to a person injured in any other way. The application of this provision is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill of Rights of the United States Constitution guaranteeing right to trial by jury, equal protection and due process.

5. **Limitation on "Non-Economic Damages"** – Section 538.210 purports to limit non-economic damages to a particular dollar figure as set forth each January 1st. That particular dollar figure purportedly applicable at the present time is $430,000.00 per separately insured defendant.

This most noxious and unconstitutional provision harms those the most who are in most need of the award and who are hurt the worst. This provision of Chapter 538 cannot withstand judicial scrutiny, and should be stricken forthwith. Plaintiffs herein should not be

unfairly deterred or threatened by the potential applicability of this damage limitation provision. The application of this provision is directly in violation of Sections 2, 10, 14, and 22(a) of the Missouri Constitution and Bill or [sic] Rights of the United States constitution guaranteeing right to trial by jury, equal protection and due process.

6. **Chapter 538 In Its Entirety** – The above provisions and the remaining provisions of Chapter 538, in its entirety, work to undermine the rights of medical negligence plaintiffs as contrasted directly to those rights of other injured persons. Chapter 538 as a whole is unconstitutional and directly violative of the particular constitutional provisions as set forth herein. It should be stricken in its entirety and rendered null and void as applicable to the cause of action herein.

D. Chapter 538 and the Specific Provisions Therein, Are Directly Violative of the Missouri Constitution, Article 1, Bill of Rights, Sections 2, 10, 14, and 22(a)

1. **Plaintiffs' Constitutional Rights To Equal Opportunities Under the Law are Violated by Chapter 538 and its Provisions Therein** – Section 2 of Article 1 of the Missouri Constitution, which is the Bill of Rights, provides as follows:

> "That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; *that all persons are created equal and are entitled to equal rights and opportunities under the law;* that to give

> security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

(Missouri Constitution of 1945, Article 1, Section 1) (Emphasis added). The specific provisions of Chapter 538 set forth above and incorporated in this section by specific reference thereto violate Plaintiffs' constitutional rights.

Chapter 538 creates a "suspect class" of persons injured by the acts of health care providers and imposes upon them burdens and conditions affecting their fundamental rights which are not imposed upon other members of the larger class of injured persons in general. In that a "suspect class" exists, strict judicial scrutiny of the offending statute is required by the Missouri Constitution. ***State Board of Registration for the Healing Arts v. Giffen*, 651 S.W.2d 475, 479 (Mo. 1983); *State v. Bolder*, 635 S.W.2d 673, 682 (Mo.banc. 1982), *cert. denied*, 459 U.S. 1137 (1983).**

Persons injured by a drunk driver, a toppling building, or in an airplane crash have the rights and privileges of the common law unfettered by Chapter 538 and similar provisions therein. For example, in a motor vehicle accident, a defendant may not point to the actions of a released party and claim that certain fault should be attributable to that released party with the effect of reducing his or her own apportionment of fault. Merely permitting the evidence of allegedly negligent acts of non-parties creates an unnecessary burden and impediment to the malpractice victim's case.

Chapter 538 and its provisions should be stricken down as directly violative and in conflict with Section 2 of Article 1, Bill of Rights of the Missouri Constitution.

2. **Chapter 538 and its Individual Provisions Violate Due Process of Law** – Section 10 of the Missouri Constitution, Article 1, Bill of Rights, provides that:

> "That no person shall be deprived of life, liberty or property *without due process of law.*"

(Missouri Constitution of 1945, Article 1, Bill of Rights, Section 10) (Emphasis added). By enacting Chapter 538 and seeking to apply it to persons injured by the actions of health care providers, the legislature is denying to Plaintiffs herein and other similarly injured persons the due process of law guaranteed by the Constitution.

Due process of law is not some amorphous concept devoid of substance or meaning. The Missouri Supreme Court has expressly stated that the term "due process of law" is synonymous with the "law of the land." ***State v. Jones*, 268 S.W. 83 (Mo. 1925); *Wilcox v. Phillips*, 169 S.W. 55 (Mo. 1914).** In particular, "due process of law" means that the individual safeguards applicable for the protection of the individual rights for one class of persons will govern precisely those rights and duties for persons which belong to that same class. ***Ivie v. Bailey*, 5 S.W.2d 50 (Mo. 1928).** Due process requires that the law applies equally to *all* within a particular class and failing that, there is a violation of a citizen's fundamental constitutional rights. ***State ex rel. Sweezer v. Green*, 232 S.W.2d 897 (Mo. 1950), *ovrld. on other grnds; State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959).**

The specific provisions of Chapter 538 set forth above, and the legislation in its entirety, deprive Plaintiffs herein of the due process of law. As such, Chapter 538 should be stricken down and held null and void.

3. Chapter 538 and its Specific Provisions Therein, Violate the "Open Courts" Provision of the Missouri Constitution – Section 14 of the Missouri Constitution, Article 1, Bill of Rights, provides that:

> "That the *Courts of Justice shall be open to every person,* and *certain remedy afforded for every injury to person,* property or character, and that right and justice shall be administered without sale, denial, or delay."

(Missouri Constitution of 1945, Article 1, Section 14, Bill of Rights) (Emphasis added). To the extent that Chapter 538 and its specific provisions set forth herein hinders Plaintiffs in their proof, obtaining a verdict and judgment, and beyond, it closes the courts to them in a very real sense.

Indeed, it was upon this provision that the Missouri Supreme Court relied in holding the original Chapter 538, requiring a Professional Liability Review Board, void as unconstitutional. ***State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner,* 538 S.W.2d 107, 110-11 (Mo.banc 1979).** If the process of requiring a pretrial procedure is held to interfere with a Missouri citizen's access to the courts, then certainly an arbitrary and burdensome trial process itself would be even more constitutionally offensive.

The remedy to be provided to Plaintiffs herein may be substantially affected by the arbitrary and unwarranted provision limiting recovery on non-economic damages. Simply requiring the categorization of damages in order to establish which damages are "non-economic" in nature burdens Plaintiffs in setting forth their proof on damages. In view of the unconstitutionality of the "damages caps" provision, this court should not require categorization of the damages as set forth by Chapter 538.215 and should similarly hold null and for naught the remaining provisions of Chapter 538 in its entirety.

The "open courts" provision of the Missouri Constitution was specifically intended to protect citizens in enforcing rights recognized by law. ***Horner v. David Distributing Company,*** **599 S.W.2d 100, 102 (Mo.App. 1980).** Missouri common law sets forth the rights of recovery, joint and several liability, and the rules affecting the obtaining of judgments and damages as applicable to all tort victims. Chapter 538 does not protect Plaintiffs herein in enforcing these rights as recognized by law and must fail.

In a recent decision balancing the rights of a medical malpractice claimant as against the State's interest in remedying a "perceived medical malpractice crisis," the Supreme Court of Missouri came down firmly on the side of the medical malpractice plaintiff. In ***Strahler v. St. Luke's Hospital,*** **706 S.W.2d 7 (Mo.banc 1986),** the Court struck down as unconstitutional the legislative attempt to bar a medical malpractice claimant's claim for failure to file within the statutory two-year period of limitation. ***Id.*** **at 8-9.**

The Court began its constitutional analysis by emphasizing that the Missouri and Federal Constitutions are not synonymous. According to the Court:

> " . . . our State constitution is also a reservoir of personal rights and liberties – some of which are not enumerated in or accorded protection by our Federal Constitution. Article I, Section 14 is one such provision in our State Constitution which grants to the people of Missouri an express constitutional guarantee not enumerated in our Federal Constitution."

Id. at 9 (Emphasis added). The Court proceeded to review the decision of ***State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, supra,*** concluding that that decision "was intended to give constitutional protection to a litigant's ability to gain access to Missouri's courts." *Id.*

In reviewing the constitutional history of the "open courts" provision, the Court concluded that:

> "The language contained in Mo.Const.Art. I, Sec. 14, is not simply advisory in nature: it gives express constitutional protection to a litigant's right of access to our court system."

Id. The Missouri Supreme Court then went about the task of weighing the legislature's purpose in enacting the statute as balanced against the effect on the malpractice claimant's constitutional rights. The Court pointed out that:

> "State legislatures reacted in the 1970's to a perceived crisis in medical malpractice insurance by enacting these types of limitations provisions. ***While some provisions no doubt go some***

> ***distance in alleviating the problem of malpractice insurance and health care providers, they do so only at a high cost.***"

Id. **at 10** (citing to 5 *Journal of Legal Medicine,* 469 [1984]) (Emphasis added). While the Court "fully appreciate[d]" the purpose of the legislature in enacting this statute, the Court expressly found that:

> " . . . the method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price . . . "

Id. **at 11.** In no uncertain terms, the Court held that the statute "runs afoul of our State Constitution and we accordingly hold it constitutionally infirm." ***Id.***

Precisely the same constitutional balancing and analysis is applicable to the legislation challenged in the case at bar. Although a few of the challenged provisions have in their pre-trial effect only a "chilling" propensity, such as the requirement to reduce future damages to present value, other provisions directly and immediately impact upon the trial of the case.

For example, permitting into evidence any testimony as to the fault of a non-party or released party would serve to undermine and diminish Plaintiffs' full and fair access to the courts and denies that "certain remedy afforded for every injury to person," which is Plaintiffs' constitutional guarantee under Article 1, Section 14. If the *Strahler* Court held that piece of legislation unconstitutional, the Supreme Court of Missouri surely would find the current version of Chapter 538 even more noxious and require swift and certain constitutional nullification.

4. Chapter 538 and its Specific Provisions is Violative of Plaintiffs' Constitutional Right of Trial by Jury. Section 22(a) of the Missouri Constitution provides that:

> *"That the right of trial by jury as heretofore enjoyed shall remain inviolate;* provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury."

(Missouri Constitution of 1945, Bill of Rights, Article 1, Section 22[a]) (Emphasis added).

The medical malpractice legislation, Chapter 538, and its specific provisions, directly and substantively interfere with Plaintiffs' right of trial by jury. This right has been construed to mean the right to a jury trial as it was recognized at the time of the adoption of the Missouri State Constitution. ***Lee v. Conran*, 111 S.W.1151, 1153 (Mo. 1908).** That provision has existed virtually unchanged since the first Missouri Constitution was adopted in 1820.

Any civil action for a money judgment involving factual issues has always entitled plaintiff to a trial by jury. ***Jaycox v. Brune*, 434 S.W.2d 539, 542-43 (Mo. 1968).** The Plaintiffs' constitutional right to a trial by jury in this action is in immediate and impending danger of being violated by Chapter 538. The right to trial by jury means that the jury passes upon all disputed issues of fact.

To the extent that the Missouri legislature has sought to "pre-judge" the maximum extent of the Plaintiffs' money damages herein squarely and directly violates the right to trial by jury. Plaintiffs respectfully request that their full right to trial by jury be exercisable pursuant to Section 22(a) of the Missouri Constitution and that Chapter 538 in its entirety be stricken forthwith.

5. **Chapter 538 and its Specific Provisions Denies Plaintiffs Equal Protection and Due Process of Law Under the United States Constitution** – Due process of law under the United States Constitution means that a person has an opportunity to be heard at a meaningful time and in a meaningful manner. ***McGowan v. Maryland,* 366 U.S. 420, 426 (1961).** The Fourteenth Amendment to the United States constitution guarantees equal protection under the law and due process of law. The specific provisions set forth above violate the United States Constitution in every respect and in the same fashion as the Missouri Constitution. For these reasons, the provisions of the medical malpractice statute, and the statute in its entirety, must fail.

In ***Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803),** Chief Justice Marshall stated that:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *One of the first duties of government is to afford that protection.*"

(Emphasis added).

III. CONCLUSION

The vast majority of medical malpractice statutes across the country which create different rights and burdens for victims of medical negligence and different privileges for malpractice defendants have been stricken down as unconstitutional. Indeed, our experience in Missouri with the prior medical malpractice statute having been stricken as unconstitutional is powerful precedent to the fate of this most recent legislation.

The applicability of the medical malpractice legislation affects the rights of Nicole and Julia Alice Adams to a jury trial, equal protection of the law, open courts, and a remedy by due process of law, all of which are guaranteed by the Bill of Rights of the Missouri Constitution of 1945. The Bill of Rights of the Missouri Constitution is there to protect every citizen, rich or poor, politically powerful or not. In striking down the provisions of the Kansas medical malpractice statute, the Kansas Supreme Court held that all of these rights were applicable to every citizen, even the "little guy on the block," and stated:

> *"They (provisions of the state's Bill of Rights) are there to protect the rights of a brain-damaged baby. a quadriplegic farmer or business executive, and a horribly disfigured housewife who is a victim of medical malpractice.* They are not there to see that the will of the majority is carried out, but to protect the rights of the minority. It is the obligation of this court in each case to carry out its constitutional responsibility."

***Kansas Malpractice Victim's Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)** (Emphasis added).

Given the enormous time and expense of presenting a medical negligence action and putting on proof by both Plaintiff and Defendants, Plaintiffs Nicole and Julia Alice Adams respectfully request that this Court find that the provisions of Chapter 538 should be rendered null and void as unconstitutional under the Missouri and United States Constitutions and bar its application in every respect at the trial of this action.

WHEREFORE, for the above-stated reasons, Plaintiffs Nicole and Julia Alice Adams respectfully request that this Court enter its Order in this matter as follows:

(a) that Chapter 538, Missouri Revised Statutes (Tort Actions Based on Improper Health Care) is directly violative of the Missouri and Federal Constitutional provisions set forth herein and shall be rendered null and void and of no effect in the trial of this action or beyond; and

(b) For such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage-paid, on this 4th day of February, 1991, to:

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/s/ Anita Porte Robb
ATTORNEY FOR PLAINTIFFS

APPENDIX B

OUT-STATE MATURE CLAIMS MADE RATES
500,000/1,000,000 LIMITS

	GENERAL PRACTICE	GENERAL SURGERY	OB/ BYN [sic]
MDA	8,300	28,596	46,118
MoMED	11,389	33,416	47,345
RCA	8,924	31,263	50,149
ST. PAUL	20,360	40,071	76,962
AVERAGE	15,090	33,336	55,211

Above as of 12/1/88

MDA	6,415	16,534	38,309
MoMED	9,471	14,207	40,254
RCA	6,340	22,303	35,967
ST. PAUL	19,963	39,623	61,292
AVERAGE	10,547	23,167	43,956

Above as of 12/1/91

Compiled by Missouri Department of Insurance

MOMEDICO Rates 1983 - 1991
Mature Claims Made Rates 500,000/1,000,000 Limits

Year	Family Practice/ Normal Deliveries	General Surgery	OB/GYN
1983	$7,045	$11,669	$16,293
1984	8,806	14,586	20,366
1985	13,089	22,437	31,787
1986	18,327	34,034	44,506
1987	21,076	39,140	51,182
1988	22,975	42,668	55,796
1989	21,595	40,104	52,444
1990	19,183	32,883	46,585
1991	17,311	29,673	42,038

MOMEDICC New Claims Reported by Calendar Year

Year	Number of Claims
1983	224
1984	255
1985	262
1986	192
1987	194
1988	158
1989	160
1990	137

Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

No. 92-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NICOLE ADAMS, A Minor Child,
By and Through Her Next Friend BETTY RIDGELL, and
BETTY RIDGELL, as Representative of the
Estate of JULIA ALICE ADAMS,

Petitioners,

vs.

THE CHILDREN'S MERCY HOSPITAL and
JANE JELINEK-BOOZALIS, M.D.,

Respondents.

BRIEF OF THE MISSOURI STATE MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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October 26, 1992

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QUESTIONS PRESENTED

Does this Court have jurisdiction to issue a writ of certiorari, pursuant to 28 U.S.C. Section 1257, when the specific constitutional questions at issue were not presented to the state court below, in a timely manner, to enable the state court to pass on those questions?

Is a substantial federal question presented by the Petition for Writ of Certiorari in light of the fact that this Court has refused to review similar statutes from other states limiting damage awards in medical negligence cases on the grounds that no substantial federal question was presented thereby?

Is the Due Process Clause of the Fourteenth Amendment violated by a state statute which merely modifies, but does not abrogate, a common law cause of action?

Is the Equal Protection Clause of the Fourteenth Amendment violated by a state statute which, in limiting recovery of non-economic damages in medical malpractice actions, neither impacts a suspect class nor impairs on a fundamental right?

PARTIES TO THE PROCEEDING

The parties to these proceedings are as indicated in the caption of the Petition for Writ of Certiorari, with the exception of Suzanna Roushar, R.N., and Cynthia Dooley, R.N. Petitioners have listed Ms. Roushar and Ms. Dooley as parties although they did not participate in the appeal in the Missouri Supreme Court below.

Both Ms. Roushar and Ms. Dooley received verdicts in their favor in the trial of this cause. Petitioners, plaintiffs below, did not preserve any claim of error as to either of those defendant's verdicts. The time for preserving any such claim of error for appeal has long since passed. Neither Ms. Roushar nor Ms. Dooley joined in the hospital's appeal in the Missouri Court of Appeals. Therefore, they are not parties to this appeal and are no longer parties to this action.

In addition, the Missouri State Medical Association and the American Medical Association are filing a brief as Amici Curiae in support of respondents.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	iv
Interest of *Amici Curiae*	1
Summary of the Argument	3
Argument	5
Medical Malpractice: The Problem	5
Medical Malpractice: The Solution	9
The Missouri Solution	10
The Results	13
Conclusion	15
Certificate of Service	16
Appendix A	A-1
Appendix B	A-2

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. XIV 3,15

STATUTES:

Section 538.210 Revised Statutes of Missouri (1986) ...*passim*

CASES:

Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. 1992) 14

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 14

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No. 92-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NICOLE ADAMS, A Minor Child,
By and Through Her Next Friend BETTY RIDGELL, and
BETTY RIDGELL, as Representative of the
Estate of JULIA ALICE ADAMS,

Petitioners,

vs.

THE CHILDREN'S MERCY HOSPITAL and
JANE JELINEK-BOOZALIS, M.D.,

Respondents.

BRIEF OF THE MISSOURI STATE MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

INTEREST OF *AMICI CURIAE*

The Missouri State Medical Association is a private, voluntary, non-profit organization of physicians and medical students. It was founded in 1850 to serve its members through promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri.

The Missouri State Medical Association has 5,500 physician and medical student members, comprising approximately 80% of the physicians in Missouri.

The American Medical Association, a private, voluntary, non-profit organization of physicians, was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its 280,000 members practice in all fields of medicine.

The statutory provisions of Chapter 538 of the Revised Statutes of Missouri, including Section 538.210.1, now at issue before this Court, have an important and unique history. It is unique in that these legislative enactments were the fruit of much labor, negotiation and compromise among all of the parties touched by the medical malpractice insurance crisis. These negotiations took place between the Missouri Association of Trial Attorneys, representatives of Missouri's malpractice insurance companies and a coalition of health care provider organizations consisting of the Missouri State Medical Association, the Missouri Hospital Association and the Missouri Association of Osteopathic Physicians and Surgeons. Together, they sculpted a legislative package which all parties agreed would be the most beneficial to the interests they represented and to the continued integrity of the health care industry as a whole.

In December of 1985, the compromise agreement and legislative proposal was communicated to the Missouri Senate Interim Committee on Medical Malpractice and Products Liability, which had been gathering information of its own on the crisis. Realizing the importance of the agreement reached, the legislature adopted the proposed legislative package and enacted it into law as Senate Bill No. 663, with an emergency clause, in January 1986. On February 3, 1986, the bill was signed into law by Governor John Ashcroft and became immediately effective.

The purpose of this brief is to provide background information on the relevant facts leading up to the passage of Senate Bill No. 663, the Medical Malpractice Reform Act of 1986, as it is now embodied within Chapter 538 of the Revised Statutes of Missouri. It is also the purpose of Amici to address the reasons why this legislation, and specifically Section 538.210 RSMo. (1986), is not only reasonable and necessary, but also constitutional as applied. The Missouri State Medical Association, with the support of the American Medical Association, played an integral part in the passage of these statutes and are strongly supportive of the affirmative impact which they are having in helping to alleviate the medical malpractice insurance crisis in Missouri.

SUMMARY OF THE ARGUMENT

The petitioners are asking this Court to invoke its jurisdiction pursuant to 28 U.S.C. Section 1257(a) and review the constitutionality of Section 538.210[1] under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Basic to the analysis under both of these constitutional provisions is whether the Missouri Legislature had a rational and legitimate purpose in enacting this statute.

As Amici Curiae, the Missouri State Medical Association and the American Medical Association bring to this Court the unique historical events which led the legislature to pass this statute in 1986.

In the mid 1970s and again in the early 1980s, health care providers in Missouri experienced extreme difficulty in obtaining affordable malpractice insurance. A primary cause of this disruption in the medical liability insurance market was that the numbers of malpractice claims being filed skyrocketed during these periods. At the same time, the average magnitude of pay-

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[1] All statutory cites are to the Revised Statutes of Missouri (RSMo.) unless otherwise indicated.

outs on medical liability claims was also escalating dramatically. In response to these factors, health care providers began to drastically limit their practices. Fees for most medical services increased, while others, particularly in specialty and high risk areas of practice, became totally unavailable in many regions of the state.

In an effort to curb this crisis, the Missouri Legislature passed the Missouri Medical Malpractice Reform Act, now embodied in Chapter 538 of the Revised Statutes of Missouri. The provisions of Chapter 538 are the result of a carefully negotiated compromise agreement among the state's health care providers, trial attorneys and insurance companies, as well as a response to information gathered by a Senate Interim Committee which held eight hearings throughout the state and heard testimony from over 100 witnesses.

Against this historical backdrop, it is clear that the legislature did, in fact, enact this legislation for the reasonable and legitimate purpose of ensuring the continued viability and availability of affordable health care in Missouri. Not only is the legislation rationally, if not substantially, related to this purpose, but statistical data provides compelling proof that the legislation is indeed bringing about its desired effect.

ARGUMENT

Medical Malpractice: The Problem

In recent years, the number of medical malpractice claims and the size of jury awards have grown at an unprecedented rate. The effect of increases in claim frequency and severity was felt by physicians nationwide in the early 1970s. By 1974, physicians in several states began to experience severe problems in obtaining malpractice insurance. Notwithstanding substantial premium increases, a number of insurers left the market entirely, and some health care providers were simply unable to secure liability insurance at any price. These factors led to what many have labeled as a "crisis" in malpractice insurance.

In an effort to address this crisis in Missouri, the General Assembly enacted a tort reform package in 1976 which included a new medical malpractice statute of limitations which utilized an occurrence accrual date (Section 516.105); establishment of a pretrial screening panel (Section 538.010-080) (Repealed 1984); and a prohibition against the inclusion of any dollar amount in the demand clause of a medical malpractice petition (Sup. Ct. R. 55.06).

These statutory enactments represented a first step in the attempt to curb the rising tide of problems affecting health care providers. But they did not do enough, resulting in a second crisis period in the early 1980s. The number of medical malpractice claims filed per year in Missouri rose from 832 in 1981 to 2,074 in 1986[2]. This represented an increase of 249% over just five years.

Concern began to grow among the general public and the Missouri General Assembly over the continued deliverability of

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[2] Missouri Medical Malpractice Insurance Report, Missouri Department of Insurance, Statistical Section.

health care services and the increased cost of health care. It was clear that greater steps were needed in order to meet the medical malpractice crisis head-on.

On May 20, 1985, the Missouri Senate established an Interim Committee to gather information on the medical malpractice issue and consider alternative solutions to the problems relating to medical practice.[3] Their task was to find a balance between society's desire for affordable health care and the desire to justly compensate tort victims.

The Interim Committee utilized three methods of gathering its information: 1) it held eight public hearings throughout the state; 2) it obtained and reviewed reports, articles and surveys on the problem; and 3) it conducted surveys of its own.[4]

The Committee began its task by learning what the many causes were for the rapid increase in medical malpractice claims. At hearings held throughout Missouri, the Committee heard testimony from over 100 citizens ranging from health care providers, insurance representatives and attorneys, to victims of medical malpractice. Testimony was also received from representatives from the Missouri Division of Insurance and the Missouri Board of Registration for the Healing Arts.[5] As a result of these hearings, the Committee found that Missouri was facing not only an insurance crisis, but a reinsurance crisis as well.[6]

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[3] The Committee also reviewed issues relating to products liability cases, but concentrated on the medical malpractice area. The Committee was unable to make any conclusions or recommendations relating to products liability. Only those findings of the Committee which pertain to medical malpractice will be addressed in this brief.

[4] Report of the Senate Interim Committee on Medical Malpractice and Products Liability, Page 2.

[5] *Id.*

[6] Terry, *Missouri's Malpractice Concord*, 51 Mo.L.Rev. 457 (1986)

Multiple causes and effects of the crisis in the health care industry were discovered by the Committee. First, although medical treatment procedures have become more sophisticated, medicine is still not an exact science. Each patient responds differently to the same medical procedures, therefore, the results of any one procedure cannot be guaranteed. Additionally, the increasing complexity of medical procedures has brought with it an increased risk of serious injury to the patient.

Another reason for the crisis was patients often carried unrealistic expectations, causing them to underestimate the risks of medical treatment. A disappointing result was assumed to be the result of medical malpractice. The increased litigiousness of society also accounted for an increase in the number of medical malpractice claims filed. Nationwide, claims frequency rose from 3.2 claims per 100 physicians prior to 1981 to 10.2 claims per 100 physicians in 1985.[7]

Many of the medical malpractice lawsuits filed against health care providers were groundless. Missouri experience was consistent with national data showing that more than half of medical liability claims closed in 1984 were dismissed with no payment to a plaintiff.[8] Testimony indicated a plaintiff would file a frivolous suit on the assumption a health care provider would prefer to settle the claim for a relatively small amount and, therefore, avoid proceeding with an expensive trial.

The contingent fee system utilized by most plaintiffs' attorneys received criticism for promoting litigation. Also, better policing of the medical profession could reduce the number of negligent and incompetent health care providers.

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[7] American Medical Association, *Socioeconomic Characteristics of Medical Practice*, p. 13, (1986).

[8] U.S. General Accounting Office, *Medical Malpractice: Characteristics of Claims Closed in 1984*, GAO/HRD-87-55, p. 19 (1987).

Finally, large settlements and awards were often the product of an overly sympathetic jury. And, although evidence of collateral sources was not admissible, many jurors rendered a verdict against a health care provider with the belief that the actual amount of damages would be paid for by an insurance company.

This combination of factors which led to the increased number of claims filed, and average cost of claims closed, consequently led to the increase in costs of malpractice insurance. From 1978 to 1985, the increase in the annual premiums paid by family practice physicians in Missouri rose an average of 296%.[9]

The Committee found that these increased costs to physicians affected patient care in four significant ways. First, the physicians' costs were being passed on to patients in the form of higher charges for services. Second, the fear of litigation prompted physicians to practice defensive medicine. Often, tests were ordered for patients even after a diagnosis or other medical judgment was actually formed, but which were necessary to generate anticipated defense exhibits documenting that medical judgment if a malpractice suit were later filed. The costs of these tests were passed on to patients as well.

Third, physicians limited their field of practice in order to avoid high risk procedures. Doctors who perform such procedures are classified according to risk of suit and required to pay higher premiums to their malpractice insurance carriers. A family practitioner, for example, could eliminate obstetrical services from his or her practice and substantially decrease the malpractice premium and the risk of incurring a claim. As an example, in 1985, only one family practitioner in the City of Springfield—Missouri's third largest city—provided obstetrical services.[10]

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[9] *Id.*, Report of Senate Interim Committee on Medical Malpractice and Products Liability, Table II, at Page 18.

[10] *Id.*, at page 24.

Fourth among these effects was an alarming loss of medical services for indigents. Again, obstetric and other high-risk patients were most often affected. From April through September of 1985, the fear of litigation and escalating malpractice premiums caused the closing of 3 of 6 county public health clinics in the southeast "bootheel" region of Missouri, and the loss of 9 of 12 staff physicians. As a result, approximately 25 women per month were being turned away for prenatal care in those counties.[11]

Health care providers were not the only people who felt that something must be done to control the medical malpractice crisis. A poll of 2,130 Americans conducted in March of 1987 by Lewis Harris & Associates, Inc., revealed that nearly all those sampled desired *some* change in the civil justice system, including decreasing the cost of lawsuits, prompt hearing of cases and a reduction in excessive damage awards.[12]

Medical Malpractice: The Solution

In response to the growing medical malpractice insurance crisis in the 1970s, 49 states enacted tort law reforms aimed at reducing claim frequency, claim severity, and the time and expense of resolving claims. Among these were measures which shortened statutes of limitation, limited damage awards, pretrial screening panels, arbitration, offsets for collateral benefits, restricted contingent fees and periodic payment of malpractice awards.

A study to evaluate the effects of these changes was conducted by the Rand Corporation in 1982, and updated in 1986. It showed that the only changes which had a measurable impact were those statutes which had *limited awards* and which had provided a

[11] *Id.*, at 25-26.

[12] Plager, S. Jay and Sundwall, David N., Department of Health and Human Services Report of the Task Force on Medical Liability and Malpractice, page 6, August 1987.

mandatory offset for collateral benefits.[13] These provisions, along with limitations on statutes of limitation resulted in reduced claim frequency and severity.[14] Pretrial screening panels were found to have no positive effects.[15]

The Missouri Solution

In 1985, Missouri's health care providers began to lobby for additional legislation to deal with the escalating medical malpractice crisis. In turn, trial attorneys were promoting their own efforts to protect the interests of injured plaintiffs and to place a moratorium on future malpractice legislation. As the two sides deadlocked, it became apparent to all concerned that a solution to this crisis could be reached only through negotiation between the various interest groups.

In the fall of 1985, a coalition of interest groups was formed to work in conjunction with the Missouri Senate Interim Committee. The parties comprising the coalition were the Missouri Association of Trial Attorneys, Missouri State Medical Association, Missouri Association of Osteopathic Physicians and Surgeons, Missouri Hospital Association, Missouri Professional Liability Insurance Association, Missouri Medical Insurance Company, and Medical Defense Association.

The coalition engaged in direct negotiations to work out a compromise for a proposed legislative package. After three meetings, an agreement was reached between the parties[16] and a

[13] Danzon, Patricia M. and L.A. Lillard, The Resolution of Medical Malpractice Claims: Research Results and Policy Implications, The Rand Corporation, R-2793-ICJ, 1982.

[14] Danzon, Patricia M., The Frequency and Severity of Medical Malpractice Claims: New Evidence, Vol. 49:NO2 Law and Contemporary Problems 57 (Spring 1986)

[15] *Id.*

[16] The full text of the agreement may be found at 83 Missouri Med. 20-21 (1986).

joint proposal was submitted to the Senate Interim Committee. Each specific provision relating to both malpractice prevention and malpractice litigation had been agreed to by each of the members of the coalition. The group further concluded that the proposal should be enacted into legislation and presented on an emergency basis, effective only on causes of action accruing after the date of enactment. If any part of the legislative package were to be declared unconstitutional, the remaining provisions would remain in effect and the members of the coalition would meet to repair and reenact the stricken provision.

On January 8, 1986, the Senate Interim Committee submitted its report and recommendations to the Missouri General Assembly. As a basis for the proposals, the report stated:

> The committee concludes that problems relating to medical malpractice threaten the quality of medical care for Missourians. The increased frequency and severity of claims against health care providers and the rapidly escalating premiums for medical malpractice insurance have affected the cost and availability of health care in this state. As a result of higher malpractice premiums and the fear of litigation, most patients pay more for medical treatment while some patients are unable to secure any treatment. Physicians have discontinued practice in specialty areas, have refused to treat high-risk patients, and have practiced costly defensive medicine.
>
> The committee believes legislative action may alleviate Missouri's medical malpractice problem. The committee recognizes that some factors exacerbating the medical malpractice problem are beyond the scope of legislative relief. Accordingly, the committee limits its recommendations to areas appropriately addressed by legislation.
>
> The committee proposes legislation that limits awards for non-economic damage. Juries would itemize malpractice [sic] awards and future damages may be structured. The

> doctrine of joint and several liability would be modified, physicians would maintain malpractice insurance in some instances, and hospitals would report problem physicians to the Missouri Board of Registration for the Healing Arts. The Board of Healing Arts would also be granted authority to immediately suspend the license of a physician upon just cause.

Report of the Senate Interim Committee, supra, at 27-28.

The report contained a listing of ten proposed legislative enactments aimed at alleviating the medical malpractice problem. The first three of those recommendations relate directly to the statutory provision now at issue before this Court. The written recommendations presented to the General Assembly by the Senate Interim Committee are clear and direct evidence of the rational legislative intent underlying the passage of what is now Section 538.210. They are quoted in pertinent part below:

> 1) Limit awards for non-economic damages to $350,000 per defendant. Non-economic damages include pain and suffering, disfigurement, loss of consortium, impairment of the quality of life, etc., but does not include exemplary (punitive) damages.
>
> Such a provision ensures that an injured person receives all economic damages caused by a health care provider. The limit on non-economic awards should alleviate the problems of affordability and availability of medical malpractice insurance.
>
> 2) The limit on non-economic awards shall be adjusted to reflect the cost of living.
>
> 3) Juries shall itemize awards. Itemized verdicts are essential to implement the provision limiting non-economic damage awards.

Report of the Senate Interim Committee, supra, at 28-29.

These and other recommendations of the Senate Interim Committee were adopted by Missouri's 84th General Assembly and enacted into law as the Medical Malpractice Reform Act of 1986, in January of that year. On February 3, 1986, the bill was signed into law by Governor Ashcroft and became immediately effective.

The provisions of the Medical Malpractice Reform Act of 1986 are now embodied within Chapter 538 of the Revised Statutes of Missouri. The cap on non-economic damages found in Section 538.210. was, and is, an integral part of that legislative package.

The Results

The Missouri solution is working. Since the passage of Senate Bill No. 663, as incorporated in Chapter 538, there have been marked decreases in the medical malpractice insurance premiums paid by health care providers in Missouri, as well as decreases in the number of medical malpractice claims filed.

Figures provided by the Missouri Department of Insurance show that the medical insurance premiums paid by physicians in Missouri in 1991 were substantially lower than the rates paid in 1988. (Appendix A). An average of the premiums charged by the four largest medical malpractice insurance carriers in the state were compiled for three physician specialties: general practice, general surgery and obstetrics/gynecology. Premiums charged by each of the four insurance companies have steadily dropped over the past four years for all physicians.

In 1988, general practice physicians paid an average of $15,090 per year for their medical malpractice insurance coverage. In 1991, that figure fell to $10,547. Also in 1988, general surgeons paid an average premium of $33,336 for medical malpractice insurance. In 1991, their average yearly premium fell to $23,167. A similar decline was reflected in premiums paid

by obstetrics/gynecology physicians, who in 1988 paid an average of $55,211 per year for medical malpractice coverage. In 1991, insurance premiums for these physicians decreased to an average yearly payment of $43,956.

In addition to the decline in physicians' insurance premiums, there has been a sharp decline in the number of medical malpractice claims reported since the passage of the enactments in Chapter 538. (Appendix B). The data for this comparison was compiled by the Missouri Medical Insurance Company (MOMEDICO), a physician owned company formed by the Missouri State Medical Association in 1978 to assure a solvent provider of medical malpractice insurance for Missouri physicians. Medical malpractice claims filed against physicians insured by MOMEDICO have fallen from a high of 262 claims in 1985 to only 137 claims in 1990.

The statistics above provide direct evidence that the Medical Malpractice Reform Act of 1986, as incorporated into the statutory provisions of Chapter 538, continue to fulfill their intended legislative purpose to alleviate the crisis in health care experienced in Missouri.

Indeed, the Missouri Supreme Court found this to be the case when it upheld the constitutionality of these provisions. Surviving both a due process and equal protection analysis, the court found that the limitation on non-economic damages in Section 538.021 "is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 904 (Mo. 1992).

Similar provisions have likewise been upheld in several jurisdictions. *See, Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989).

Petitioners herein fail to show that Section 538.210 violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Therefore, amici respectfully submit that certiorari should be denied in this case.

CONCLUSION

The State of Missouri has the paramount right to protect its citizens by fashioning a means of relief for its injured persons as well as its besieged health care providers. Through passage of Section 538.210, the state has done so through a reasonable means. Therefore, its efforts to redress the crisis in health care should not be disturbed. The petition for writ of certiorari should be denied.

Respectfully submitted,

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October 26, 1992

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I hereby certify that I served three true copies of the foregoing document upon all parties on this 26th day of October, 1992, via prepaid United States mail, to:

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APPENDIX

APPENDIX A

OUT-STATE MATURE CLAIMS MADE RATES
500,000/1,000,000 LIMITS

	GENERAL PRACTICE	GENERAL PRACTICE	OB/ GYN
MDA	8,300	28,596	46,118
MoMED	11,389	33,416	47,345
RCA	8,924	31,263	50,149
ST. PAUL	20,360	40,071	76,962
AVERAGE	15,090	33,336	55,211
	Above as of 12/1/88		
MDA	6,415	16,534	38,309
MoMED	9,471	14,207	40,254
RCA	6,340	22,303	35,967
ST. PAUL	19,963	39,623	61,292
AVERAGE	10,547	23,167	43,956
	Above as of 12/1/91		

Compiled by Missouri Department of Insurance

APPENDIX B

MOMEDICO Rates 1983 - 1992
Mature Claims Made Rates 500,000/1,000,000

Year	Family Practice/ Normal Deliveries	General Surgery	OB/GYN
1983	$ 7,045	$11,669	$16,293
1984	8,806	14,586	20,366
1985	13,089	22,437	31,767
1986	18,327	34,034	44,506
1987	21,076	39,140	51,182
1988	22,975	42,668	55,796
1989	21,595	40,104	52,444
1990	19,183	32,883	46,585
1991	17,311	29,673	42,038
1992	17,311	24,782	42,038

MOMEDICO New Claims Reported by Calendar Year

Year	No. of Claims
1983	224
1984	255
1985	262
1986	192
1987	194
1988	158
1989	160
1990	137

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CHILDREN'S MERCY HOSPITAL, et al.
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. THE CONSTITUTIONALITY OF DAMAGE LIMITS IS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. 2

A. CONSTITUTIONAL LIMITS ON LEGISLATIVE POWER TO INFRINGE COMMON LAW RIGHTS ARE AN ISSUE OF FUNDAMENTAL IMPORTANCE. 3

B. THIS COURT SHOULD DETERMINE WHETHER DUE PROCESS FORBIDS INFRINGEMENT OF IMPORTANT COMMON LAW RIGHTS WITHOUT AN ALTERNATIVE REMEDY. 6

C. THIS COURT SHOULD DETERMINE WHETHER LEGISLATIVE DISCRIMINATIONS THAT INFRINGE IMPORTANT COMMON LAW RIGHTS MUST SATISFY HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE. 8

D. THIS COURT SHOULD DETERMINE WHETHER LIMITS ON COMMON LAW RIGHTS WHICH BEAR NO RATIONAL RELATIONSHIP TO LEGITIMATE STATE OBJECTIVES ARE ARBITRARY AND CAPRICIOUS. 10

II. THERE IS A CLEAR DIVISION OF AUTHORITY BETWEEN FEDERAL AND STATE COURTS AND AMONG STATE COURTS REGARDING THE CONSTITUTIONALITY OF DAMAGE LIMITS UNDER THE FOURTEENTH AMENDMENT. 13

CONCLUSION 14

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Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81 (1987).....5

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IN THE

Supreme Court of the United States

October Term, 1992

No. 92-533

NICOLE ADAMS, et al.
Petitioners,

v.

CHILDREN'S MERCY HOSPITAL, et al.
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Missouri

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief of Amicus Curiae in support of the Petitioner in this case. Letters of consent by the parties have been filed with this Court.

ATLA is a voluntary national bar association whose 60,000 members primarily represent injured plaintiffs, including many victims of medical negligence. The common law has long provided these victims with the right to seek

compensation for wrongful injury. It has also been a powerful incentive for safe medicine.

The past two decades have seen the enactment of statutes in many states limiting the common-law rights of tort victims in the name of "tort reform." These include limitations on damages recoverable in medical negligence cases. The beneficiaries of these statutes -- medical care providers and their malpractice insurers -- are powerfully represented in the halls of the legislatures. Those whose rights are bargained away -- future victims of negligence -- are necessarily unknown. ATLA has served as their voice in legislatures and the courts, seeking to preserve the right to seek redress for wrongful injury that has been the cornerstone of our civil justice system for 200 years.

REASONS FOR GRANTING THE WRIT

The Questions Presented by the Petitioner seek a determination of whether the "cap" on damages imposed by Mo. Rev. Stat. § 538.210.1(1986) violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This Court has not heretofore addressed itself to the merits of these issues. As a result, federal and state courts have reached divergent results on these important federal questions. Amicus suggests that the Petition amply satisfies two of the reasons set forth in Supreme Court Rule 10 for which the Court will grant a petition for certiorari.

I. THE CONSTITUTIONALITY OF DAMAGE LIMITS IS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The importance of the questions presented in the Petition can scarcely be overstated. Their impact reaches far beyond the parties, beyond those affected by the Missouri statute, and

even beyond the nationwide controversy concerning "tort reform." At issue is whether the United States Constitution imposes any limit on the power of legislative majorities to curtail important common-law rights.

A. CONSTITUTIONAL LIMITS ON LEGISLATIVE POWER TO INFRINGE COMMON LAW RIGHTS ARE AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The common-law right to seek redress in the courts for wrongful injury holds a special place in our civil justice system. Common-law rights were not created by legislatures and are not a matter of legislative grace. Indeed, they preceed even the Constitution. Lord Coke traced this right to the Magna Carta.[1] Justice Powell observed that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v.*

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[1]Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay. Coke, Second Institute 55-56 (4th ed. 1671).

This formulation has become the basis for provisions in thirty-seven state constitutions. Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964). Courts have struck down limits on medical malpractice damages as violative of this guarantee. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Subsequently, this Court located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). This Court has recognized that statutory limits on tort damages implicate this central common-law right and are subject to Fourteenth Amendment constraints. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-87, 91-93 (1978). The Court did not find it necessary to demark those constitutional limits. *Id.* at 88. Nevertheless, Justice Marshall, with a certain prescience, later remarked:

> [O]ur cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980)(Marshall, J., concurring).

The importance of this issue is underscored not only by the value of the common-law right abridged, but also by the its impact on a substantial number of Americans. The Missouri statute is not an isolated instance of legislative initiative. In the mid-1980's, health care providers in Missouri and across most of the country experienced a sharp increase in their malpractice liability insurance premiums. Whether this increase amounted to a "crisis" that threatened the availability and affordability of heath care services was, in the lower court's words, "a debatable proposition." *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 904 (Mo. 1992).[2]

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[2]Other courts have found the evidence of a malpractice insurance crisis dubious at best. *Arneson v Olson*, 270 N.W.2d 125, 136 (N.D. 1978); *Reynolds v. Porter*, 760 P.2d 816, 824 (Okla. 1988); *Hoem v. State*, 756 P.2d 780, 784 (Wyo. 1988). *Boucher v. Sayeed*, 459 A.2d 87, 93 (R.I. 1983). For a critical examination of assertions made by tort reform advocates, see Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 Temple L. Rev. 458 (1992).

Nonetheless, health care providers and their liability insurers mounted a well-financed and highly organized effort to promote "tort reform" as a cure for high premiums.[3] Virtually every state legislature adopted measures restricting the rights of plaintiffs. Twenty-two states, including Missouri, imposed limits on damages recoverable in medical malpractice suits.[4]

A cap on damages is the most egregious affront to the right to redress. It takes effect only after the jury has found the defendant liable and has made the factual determination of damages on the basis of the evidence. In effect, the statute requires the judge to disregard the evidence and issue a rebate to the defendant in the amount of damages above the statutory limit. The constitutionality of such measures is a question that directly affects the citizens and health care providers of nearly half the states and will impact all states that have addressed the perceived liability insurance crisis in ways that tread upon common-law rights.

The Petition does not ask this Court to determine the existence of an insurance crisis. Nor is the wisdom of the

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[3]*See, e.g.*, Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 195, 196-99 (1985); Taylor and Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. Rich. L. Rev. 799, 813 (1982). The tort reform effort generally has been criticized as an exercise in "raw interest group politics." Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988); *see also* Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81, 96 (1987).

[4]Amicus will not burden this Court with repetition of the extensive citation to state enactments at Petition, 11-12 n.8.

legislature's response at issue.[5] However, the authority that the people have granted to legislators, while broad, is not unbounded. The question of whether a cap on noneconomic damages transgresses those bounds was presented to this Court previously, but the Court did not address the merits of the constitutional issues on that occasion. *Fein v. Permanente Medical Group*, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892 (1985).

Few issues can be said to have greater importance to Americans than the availability and affordability of quality health care. In attempting to address a perceived tension between this interest and common-law rights, legislatures and courts should not be in the position of guessing at the constitutional limits of legislative action.[6] Defining these limits raises several specific constitutional questions which this Court has not, but should, resolve.

B. THIS COURT SHOULD DETERMINE WHETHER DUE PROCESS FORBIDS INFRINGEMENT OF IMPORTANT COMMON LAW RIGHTS WITHOUT AN ALTERNATIVE REMEDY.

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[5]For this reason, the distinction between economic and noneconomic damages is not constitutionally significant. At issue is whether the legislature may take away what would otherwise be a vested property interest in a valid judgment. Similarly, the amount of the cap is not at issue. As one court has pointed out, if the legislature has the power to impose a cap, it has the power to set it at $450,000 or at $1. *Smith v. Department of Insurance*, 507 So. 2d 1080, 1089 (Fla. 1987).

[6]Even the Court's bare dismissal in Fein has given rise to divergent interpretations by federal courts. *Compare Coburn v. Agustin*, 627 F. Supp. 983, 993 (D. Kan. 1985)(stating that the dismissal indicates only the Supreme Court's approval of the judgment below), with *Ferguson v. Garmon*, 643 F. Supp. 335, 340 (D. Kan. 1986)(construing the dismissal as the Court's endorsement of both the reasoning and result of the California Supreme Court).

The common-law right to sue in tort for wrongful injury stands apart from those rights which are conferred by, and can therefore be withdrawn by, the legislature. An early example is the abolition, under workers' compensation statutes, of tort suits by employees against employers for job injuries. In *New York Central R. Co. v. White*, 243 U.S. 188 (1917), this Court suggested that due process might preclude a state from abolishing common-law rights of action "without providing a reasonably just substitute." *Id.* at 201. The Court found that the statute's non-fault compensation scheme, which removed several tort defenses against recovery, constituted an adequate alternative. *Id.*

The proposition that the Due Process Clause requires such a *quid pro quo* was again before this Court in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), in the context of a statutory limit on recoverable damages due to a nuclear plant accident. However the statute also provided a "panoply of remedies and guarantees," including imposition of a form of strict liability and an expedited recovery scheme. Though the Court raised the issue of whether such a *quid pro quo* was an essential element of due process, the Court stated:

> [W]e need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

Id. at 88.

This issue was once again raised in *Fein*, where the California court had upheld a cap on noneconomic damages in medical malpractice cases. Justice White, dissenting from the dismissal of the appeal framed the issue squarely:

> Whether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is

> dividing the appellate and highest courts of several states. the issue is important, and is deserving of this Court's review.

Fein v. Permanente Medical Group, 474 U.S. 892, 894-95 (1985)(White, J., dissenting).

C. THIS COURT SHOULD DETERMINE WHETHER LEGISLATIVE DISCRIMINATIONS THAT INFRINGE IMPORTANT COMMON LAW RIGHTS MUST SATISFY HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

On its face, the Missouri statute implicates the Equal Protection Clause. Only those injured by negligent health care providers are subject to the cap; plaintiffs in all other tort cases may obtain the full amount of compensation awarded by the finder of fact. In addition, the statute discriminates against the most severely injured victims; claimants whose damages are within the limitation receive the full jury award.

This Court's equal protection cases have developed a tiered analysis. Most economic regulation will pass constitutional muster if there exists a rational relationship between the legislative distinction and legitimate state ends. Those which impinge upon fundamental rights or discriminate against a suspect class must satisfy strict scrutiny. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Amicus submits that a cap on tort damages cannot be viewed as mere economic regulation simply because it affects monetary compensation -- any more than a poll tax or tax on interstate travel could be merely economic. The proper focus must be on the nature of the right burdened.

This Court's own explication of its equal protection doctrine states:

> [T]he Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1972). A right must be deemed "fundamental" for equal protection purposes, if it is "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33. Amicus suggests that limitations on damages clearly infringe upon the right to trial by jury explicitly guaranteed by the Seventh Amendment.

Few principles of the common law are as firmly rooted and widely embraced in America as the broad discretion of juries to make factual determinations in civil cases. It is an "essential characteristic" of the federal system under the influence -- if not the command -- of the Seventh Amendment. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958). This Court has stated:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953).

It is persuasive that the highest courts of three states have invalidated caps on noneconomic damages in medical malpractice cases as violative of state constitutional guarantees of trial by jury. *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Sophie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

The question of whether caps on damages, which directly countermand findings of fact by juries, warrant heightened

scrutiny is an important question which this Court should decide.

D. THIS COURT SHOULD DETERMINE WHETHER LIMITS ON COMMON LAW RIGHTS WHICH BEAR NO RATIONAL RELATIONSHIP TO LEGITIMATE STATE OBJECTIVES ARE ARBITRARY AND CAPRICIOUS.

Even under the minimal rational basis test, the lower court's decision in favor of the validity of the statute raises important questions. The rational basis test, while deferential to legislative judgments, is not toothless. This Court has indicated that something more is required of legislation beyond a legitimate state objective and the conclusory recitation that the provisions will achieve that goal.

An instructive application of the rational basis test by the Court is *City of Cleburne v. Cleburne Living Center*, 437 U.S. 432 (1985). At issue was a special zoning requirement that effectively barred a house for the handicapped from a residential location. The municipality advanced several separate justifications for the restriction, including prevention of crowding, fire protection, proximity to a school, and protection of the patients themselves. In the abstract, it would appear that the zoning restriction would have been a valid step in furtherance of any of these justifications. However, the Court found that under the circumstances under which the ordinance would operate, there was no rational basis for the council to believe that the restriction would serve its stated purposes. *Id.* at 449-50.

Indeed, the Court has repeatedly insisted that the rational relationship between legislative means and ends exist in the real world, as well as on paper. *See, e.g. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (striking down a tax preference for in-state insurers, since the manner in which

insurers actually operate made it irrational to believe that it would foster domestic companies); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down denial of food stamps to households composed of unrelated persons, finding that the "practical operation" of the regulation was not rationally based).

The goal of the Missouri statute was to safeguard the affordability and availability of health care services to residents of the state. *Adams*, 832 S.W.2d at 904. The lower court recognized that the link between capping damages and this goal rested on three premises: First, that the cap "would reduce the aggregate amount of damage awards for medical malpractice; second, that this would "reduce malpractice insurance premiums; and third, that physicians would be willing to continue 'high risk' medical practices in Missouri and provide quality medical services at a less expensive level." *Id.*

However, the court did not inquire whether there was a basis in fact that would lead a reasonable legislator to reasonably expect that limiting damages would accomplish any, let alone all three, essential steps. There does not appear to have been any knowledge of how many jury awards of noneconomic damages in exceess of the cap had been issued by Missouri juries in medical malpractice cases, or their aggregate amount. Nationally, such verdicts are relatively infrequent. A General Accounting Office study of the claims closed by malpractice liability insurers in 1984 found that of 73,472 claims closed, only 14,995 contained payments for noneconomic damages, and only 321 of those were payments greater than $200,000. General Accounting Office, Medical Malpractice: Characteristics of Claims Closed in 1984, at 50 (1987). A study by the Insurance Services Office, the industry's rate advisory body, evaluated the effects of various tort reforms, including a $250,000 cap on noneconomic damages, on a sampling of liability situations. The study found that, in general, the savings from tort reform ranged

from "marginal to nonexistent." Insurance Services Office, Claim Evaluation Impact, National Overview 4 (1987). The cap on noneconomic damages resulted in no savings in most situations. *Id.* at 75.[7]

Even if a damage ceiling would reduce the aggregate pay-out by insurers, there is no provision that would require those carriers to pass on the savings to their insureds. Nor is there any rational determination that those savings would have a significant effect on physicians' decisions to continue practice[8] or would reduce medical costs in any significant way.[9] Finally, it does not appear reasonable to further the availability of quality of medical care by conferring a benefit on those few providers who have been found negligent.

Amicus suggests that judicial review of the basis in reality of a purported nexus between legislative means and ends is an issue that this Court should address.

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[7]On this basis, one state court concluded that a cap on noneconomic damages in medical malpractice cases was arbitrary and unreasonable. *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991)(citing ISO study).

[8]Liability insurance premiums, while substantial, generally average about 5% of physician income. Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 Temple L. Rev. 459, 496 (1992).

[9]Medical malpractice insurance premiums constitute less than 1% of total medical costs. Thomas, *supra*, at 497.

II. THERE IS A CLEAR DIVISION OF AUTHORITY BETWEEN FEDERAL AND STATE COURTS AND AMONG STATE COURTS REGARDING THE CONSTITUTIONALITY OF DAMAGE LIMITS UNDER THE FOURTEENTH AMENDMENT.

In the absence of clear direction from this Court, state and federal courts have addressed the constitutionality of damage caps with widely divergent results. Four federal courts of appeals have held that limits on damages in medical malpractice actions do not violate federal Due Process or Equal Protection guarantees. *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985). Several state supreme courts have reached similar conclusions. *E.g., Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989). Other state supreme courts, however, have concluded that damage caps violate the Fourteenth Amendment. *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).[10]

A significant number of state courts have struck down malpractice damage limits as violative of the guarantees of their state constitutions. *See, e.g., Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sophie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). While our federalist system permits, even encourages states to afford their citizens greater constitutional protections than the minimum demanded by the U.S. Constitution, courts and legislatures

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[10]The split in authority among federal and state courts is set forth with greater specificity in the Petition at notes 4-7.

legislatures should not be in the position of guessing where the federal floor might be.

CONCLUSION

For the above reasons, amicus urges this Court to grant the Petition.

Respectfully submitted,

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October 26, 1992

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No. 92-533

IN THE

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OCTOBER TERM, 1992

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v.

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION AND SUMMARY	1
ARGUMENT	2
I. PETITIONERS CLEARLY PRESERVED THE FEDERAL CONSTITUTIONAL ISSUES AT BOTH STAGES OF THE PROCEEDINGS BELOW SO AS TO SQUARELY ACCORD THIS COURT WITH JURISDICTION OVER THE TWO (2) FEDERAL QUESTIONS PRESENTED	2
II. RESPONDENTS VIRTUALLY CONCEDE THAT THERE HAS DEVELOPED A CLEAR AND SUBSTANTIAL SPLIT OF AUTHORITY AMONG THE STATE COURTS AND BETWEEN THE STATE AND FEDERAL COURTS ON THE QUESTIONS PRESENTED AND THAT THIS ISSUE IS ONE OF RECURRING NATIONAL SIGNIFICANCE	8
CONCLUSION	10
APPENDIX A	
Excerpts From Appellants' Brief Filed In The Supreme Court Of Missouri (October 24, 1991)	1a
APPENDIX B	
Appellants' Motion For Rehearing Filed In The Supreme Court Of Missouri (June 3, 1992)	38a
APPENDIX C	
Respondent Children's Mercy Hospital's Suggestions In Opposition To Appellants' Motion For Rehearing Filed In The Supreme Court Of Missouri (June 10, 1992)	44a

TABLE OF CONTENTS—Continued

APPENDIX D — Page

Excerpts From Respondent Children's Mercy Hospital's Brief In The Supreme Court Of Missouri (November 26, 1991) 48a

APPENDIX E

Excerpt From Respondent's Jelinek's Brief Filed In The Supreme Court Of Missouri (November 26, 1991) 53a

APPENDIX F

Excerpts from Suggestions of Defendants Children's Mercy Hospital, Cindy Dooley, R.N., and Susan Roushar, R.N. In Opposition To Plaintiffs' Motion To Bar Enforcement Of Chapter 538, V.A.M.S. (February 8, 1991) 55a

TABLE OF AUTHORITIES

CASES Page

Adams v. The Children's Mercy Hospital, 832 S.W.2d 898 (Mo. 1992) 3, 4
Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm., 461 U.S. 375 (1983) 6
Arneson v. Olsen, 270 N.W.2d 125 (N.D. 1978) 8
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 2, 5, 7
Beck v. Alabama, 447 U.S. 625 (1980) 7
Clark v. Jeter, 486 U.S. 456 (1988) 2
Dewey v. Des Moines, 173 U.S. 193 (1899) 7
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 2, 3, 7
Eddings v. Oklahoma, 455 U.S. 104 (1982) 7
Fein v. Permanente Medical Group, 474 U.S. 892 (1985) 8, 9
New York Central R. Co. v. White, 243 U.S. 188 (1917) 2, 3
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 6
Pfost v. Montana, 713 P.2d 495 (Mont. 1985) 8
Stanley v. Illinois, 405 U.S. 645 (1972) 7
Street v. New York, 394 U.S. 576 (1969) 5, 6
Taylor v. Illinois, 484 U.S. 400 (1988) 6
United States v. Williams, 112 S.Ct. 1735 (1992) 2
Webb v. Webb, 451 U.S. 493 (1981) 5, 7
Yee v. City of Escondido, California, 112 S.Ct. 1522 (1992) 7

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PETITIONERS' REPLY BRIEF

INTRODUCTION AND SUMMARY

The main focus of both of respondents' briefs in opposition is the federal jurisdictional issue rather than the substantive considerations governing review on a writ of certiorari. The record below firmly establishes that the federal constitutional issues presented here were clearly and plainly preserved.

The remainder of each respondent's brief serves only to bolster Petitioners' claim that there exists a direct and substantial conflict in the lower courts on the questions presented in the Petition. Having fully percolated in the courts below, it is appropriate and timely for this Court to resolve this important conflict.

ARGUMENT

I. PETITIONERS CLEARLY PRESERVED THE FEDERAL CONSTITUTIONAL ISSUES AT BOTH STAGES OF THE PROCEEDINGS BELOW SO AS TO SQUARELY ACCORD THIS COURT WITH JURISDICTION OVER THE TWO (2) FEDERAL QUESTIONS PRESENTED [1]

Petitioners' federal claims clearly were "pressed or passed upon" below in the Missouri state courts so as to accord jurisdiction in this Court.[2] The extensive appendices to this reply brief are intended solely for this Court's convenience to dispel any doubt that jurisdiction is proper in this Court. This Court's decision on certiorari in this case should be devoid of any jurisdictional concern.

A. Respondents' argument that the federal *quid pro quo* due process claim was not properly preserved in the Supreme Court of Missouri is frivolous. Not only did Petitioners raise this due process claim and cite to the *Duke Power* and *New York Central Railroad* cases in their brief to the Missouri Supreme Court, but also they discussed the federal *quid pro quo* analysis at great length.[3]

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[1] The intermediate State appellate court, the Missouri Court of Appeals, was not involved on the merits of the constitutional issues because Petitioners took a direct appeal from the trial court to the Supreme Court of Missouri.

[2] *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988); *Clark v. Jeter*, 486 U.S. 456, 459-60 (1990). This Court has made it clear that this rule "operates in the disjunctive," *United States v. Williams*, 112 S.Ct. 1735, 1738-39 (1992), such that Petitioners may satisfy this jurisdictional rule either by having "pressed" these claims below or by the State court's "passing upon" them.

[3] Petitioners' *quid pro quo* argument to the Supreme Court of Missouri included the following:

> Due Process analysis has involved the judicial requirement of a *quid pro quo* or "reasonably just substitute." *Duke Power*

The Supreme Court of Missouri did explicitly address and reject Petitioners' federal equal protection challenge. *Adams*, 832 S.W.2d at 903, 905. The federal equal protection claim was raised in precisely the same manner as Petitioners' due process claim. Petitioners' federal and state constitutional claims were merged throughout the case such that the Supreme Court of Missouri's rejection of the state due process claim clearly rebuked the cognate federal claim as well.

Nevertheless, in an abundance of caution so as to secure as clear a record as possible for this Court, Petitioners filed a Motion for Rehearing with the Supreme Court of Missouri wherein they requested that that court explicitly address the federal due process argument raised by Petitioners in their brief (Appellants' Motion for Rehearing, App. B, at 38a-39a). In response to that Motion for Rehearing, respondent hospital directly conceded the jurisdictional issue:

> This Court's May 19, 1992, decision answers the federal constitutional issues raised by the appellants.

(Respondent Children's Mercy Hospital's Suggestions in Opposition to Appellants' Motion for Rehearing, App. C, at 44a-45a). Respondent hospital clearly admitted the federal jurisdictional issue which it now seeks to dispute:

> The appellants' argument fails for several reasons: First, the rationale this Court used in finding that

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> *Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). . . . In upholding the Act under Equal Protection and Due Process grounds, the [U.S. Supreme] Court emphasized the significance of a substitute compensation scheme. *Id.* at 92-93.
>
> . . .
>
> Exactly the same reasoning applies to the case at bar in that Appellant has been deprived of a number of rights without any substitute remedy whatsoever.

(Petitioners' Brief to Supreme Court of Missouri, App. A, at 31a-33a). Petitioners also cited *New York Central R. Co. v. White*, 243 U.S. 188 (1917), as the "genesis of *quid pro quo* constitutional analysis [by] the U.S. Supreme Court." (App. A, at 31a n.31).

> Chapter 538 does not violate the trial by jury or due process provisions of the Missouri Constitution is the same analysis that applies to the United States Constitution. Therefore, the decision necessarily means that the federal Constitution has not been violated.

(App. C, at 44a-45a). Respondent hospital's current contention that "the Missouri Supreme Court did not have an opportunity to pass on this specific issue [federal due process *quid pro quo*]" (p. 3) is disingenuous and wholly inconsistent with the full record of proceedings below.[4] By upholding the statute, that court necessarily rejected the federal due process claim.

B. Respondent hospital contends that Petitioners failed to preserve the federal constitutional issues in the trial court urging that the challenge was untimely and not specific enough. These contentions are simply unsupportable based on the record.[5]

Initially, as to the timeliness of the constitutional challenge, respondent hospital raised this same point before the Supreme Court of Missouri. The Supreme Court of Missouri found that certain challenges raised *subsequent* to the entry of judgment were not preserved, but none of these involved the federal due process or equal protection challenges to the statutory "cap," both of which were raised and preserved pursuant to Missouri law in Petitioners' motion filed prior to trial. *Adams*, 832 S.W.2d at 907-08. If Petitioners' federal due process or equal

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[4] Respondent Jelinek's assertion that Petitioners failed to preserve their "arbitrary and capricious" arguments likewise should not be taken seriously. The arbitrary nature of the statute was argued repeatedly throughout Petitioners' brief to the Supreme Court of Missouri.

[5] Prior to trial, Petitioners filed a motion with the trial court challenging the Missouri statute on both federal and state constitutional grounds (Resp. Hosp.'s Brf. in Opp., App. A).

protection challenges had been untimely raised in the trial court, the Supreme Court of Missouri would have so held.[6]

As to the specificity of Petitioners' federal claims at the trial court level, it is clear that the statutory "capping" provision, as were all provisions of the Act, was being challenged under both Equal Protection and Due Process under the Fourteenth Amendment to the United States Constitution.[7] In unequivocal language, Petitioners stated:

> *Chapter 538 and its specific provisions denies Plaintiffs equal protection and due process of law under the United States Constitution*— . . . The Fourteenth Amendment to the United States Constitution

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[6] As set forth by this Court in *Bankers Life, supra*, the timeliness and manner in which the federal claim is first presented in the state courts may very well be an issue controlled by state, rather than federal, law. 486 U.S. at 78 (citing *Webb v. Webb*, 451 U.S. 493, 501 [1981]); *Street v. New York*, 394 U.S. 576, 583-84 (1969). In this regard, this Court stated:

> To the extent that the matter is governed by New York law, we have found no New York statutes or decisions which require that an issue be raised in the trial court with greater specificity than occurred here.

394 U.S. at 583. Petitioners' federal questions as raised at the trial court level clearly were timely preserved for decision by the Supreme Court of Missouri.

[7] In that Motion, Petitioners stated:

> 2. Chapter 538 is Unconstitutional Under the Missouri and United States Constitutions as Denying Plaintiffs Herein Equal Protection Under the Laws, Due Process of Law, . . . all as set forth in the attached Suggestions in support expressly incorporated herein by reference.

(Resp. Hosp.'s Brief in Opp., App. A, at 2a). The United States Constitution was invoked at the outset:

> It is the duty and responsibility of this [trial] Court to strike down and to block the application of any legislative act or statute which is in conflict with the provisions of the Federal or United States Constitution.

(*Id.* at 7a.)

> guarantees equal protection under the law and due process of law. The specific provisions set forth above violate the United States Constitution in every respect and in the same fashion as the Missouri Constitution.

(*Id.* at 20a) (emphasis in original). This last sentence cited above unambiguously confirms that throughout this pre-trial brief both state and federal constitutional analysis were merged.[8]

The nature of Petitioners' federal claims was sufficiently presented at the trial court level. This Court has determined that it had federal jurisdiction where a federal claim was submitted to the trial court in far less specific terms than utilized by Petitioners herein.[9]

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[8] In specific reference to the only statutory provision challenged herein, *i.e.*, the statutory "cap" on noneconomic damages, Petitioners plainly stated that this provision is directly in violation "of the United States Constitution guaranteeing right to trial by jury, equal protection and due process." *Id.* at 12a.

[9] In *Street v. New York*, 294 U.S. at 582-83, respondent claimed that the petitioner failed to preserve the federal claim at the trial level. This Court found that the manner of counsel's raising the federal constitutional issue in the form of a short oral motion was sufficient where the federal constitutional claim was clearly referenced and the issue was fully briefed in the appellate courts. *Id.* at 584-85. On the issue of "sufficient presentation," this Court relied upon *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928):

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

394 U.S. at 584 (footnote omitted). *See also Taylor v. Illinois*, 484 U.S. 400, 406-07 n.9 (1988); *Arkansas Electric Cooperative Corp.*

On the basis of the record below, it is abundantly clear that the federal questions presented here were timely and appropriately raised below.[10] Petitioners' pleadings were unambiguous on this score such that it was clear to respondents that the state and federal constitutional claims were merged.[11] These issues were sufficiently pre-

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v. Arkansas Public Service Comm., 461 U.S. 375, 382-83 n.6 (1983); *Beck v. Alabama*, 447 U.S. 625, 631 n.6 (1980).

As stated by this Court in *Webb, supra*, while great specificity would be desirable, "we have not insisted on such inflexible specificity." 451 U.S. at 501. In that regard, this Court has stated that "[o]ur jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982).

This Court has not even required that the precise terms of the federal question sought to be reviewed by this Court were raised in the state court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 78 n.2 ("the federal question must be brought to the attention of the court below in some manner"). Under the "mere enlargement" doctrine, "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." 486 U.S. at 78 n.2 (citing to *Dewey v. Des Moines*, 173 U.S. 193, 198 [1899] and *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 [1972]). This Court has shown a great measure of flexibility in this regard:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.

Yee v. City of Escondido, California, 112 S.Ct. 1522, 1532 (1992).

[10] Respondent hospital's disagreements to the manner in which judgment was entered are nugatory. The judgment as entered by the trial court clearly sets forth the effect of the statutory "capping" provision upon Petitioners' jury verdict. (App. C to Pet. for Writ of Cert., at 23a-25a). The defendant nurses are original parties to the appeal and have not been dismissed.

[11] Both of respondents' briefs filed with the Missouri Supreme Court contained extensive reference to this Court's decisions in the due process and equal protection areas, even citing to *Duke Power* (Excerpt from respondent Children's Mercy Hospital's brief, App. D, at 49a-51a; Excerpt from Resp. Jelinek's Brief to Missouri Supreme Court, App. E, at 54a). Respondent hospital understood from the beginning that Petitioners were raising federal constitu-

sented to the trial court and to the Supreme Court of Missouri and rejected so as to accord this Court with federal jurisdiction pursuant to 28 U.S.C. § 1257(a).

II. RESPONDENTS VIRTUALLY CONCEDE THAT THERE HAS DEVELOPED A CLEAR AND SUBSTANTIAL SPLIT OF AUTHORITY AMONG THE STATE COURTS AND BETWEEN THE STATE AND FEDERAL COURTS ON THE QUESTIONS PRESENTED AND THAT THIS ISSUE IS ONE OF RECURRING NATIONAL SIGNIFICANCE

Given the number of state appellate courts addressing the federal constitutionality of malpractice "caps," the decisions of four (4) U.S. Circuit Courts of Appeals upholding such statutes are not conclusive as to the lack of a solid split of authority. In none of those U.S. Circuit Court cases was review sought in this Court and the conflict persists unresolved among the numerous state appellate courts.[12]

This Court functions not only as an overseer of the federal courts but also as an arbiter to resolve substantial conflicts among the highest courts of the States with reference to federal constitutional questions. Sup. Ct. R.

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tional claims by the pre-trial motion (Suggestions of Defendants Children's Mercy Hospital, et al., in Opposition to Plaintiffs' Motion to Bar Enforcement of Chapter 538, App. F, at 56a-57a).

[12] Respondent hospital merely asserts without supporting argument or authority that the state appellate court cases cited by Petitioners are inapplicable. (Brf. In Opp., at 26-27). Respondents take specific issue with Petitioners' citation of *Arneson v. Olsen*, 270 N.W.2d 125 (N.D. 1978) (Brf. In Opp. at 26 n.40). Petitioners are not alone in relying upon this decision in that Justice White expressly cited this case as having "invalidated the challenged provision on federal constitutional grounds." *Fein v. Permanente Medical Group*, 474 U.S. at 893. Respondents' strained efforts to distinguish *Pfost v. Montana*, 713 P.2d 495 (Mont. 1985) are unavailing. Neither respondent even attempts to distinguish any of the other fourteen (14) decisions invalidating statutory "caps" cited by Petitioners. (Pet. for Writ of Cert., at 6 n.4 and 9 n.6).

10.1(b) (as amended, 1990). In that the overwhelming number of medical malpractice suits are brought in the state courts, this conflict among the state courts is highly relevant and significant. State courts and state court litigants are equally in need and deserving of clear guidance from this Court on federal constitutional matters as their federal counterparts.

Respondent hospital's primary substantive argument is ill-conceived. That this Court has denied certiorari on prior occasions is of absolutely no precedential value as to the worthiness of review in this particular case. The lower courts continue to be in confusion and disarray on this issue and require urgent and clear guidance from this Court. As set forth by Amicus Association of Trial Lawyers of America:

> The importance of the questions presented in the Petition can scarcely be overstated. Their impact reaches far beyond the parties, beyond those affected by the Missouri statute, and even beyond the nationwide controversy concerning "tort reform."

(Brf. of Amicus Curiae, at 2-3).

Respondent Jelinek's assertion that "there has been no significant change" since *Fein* (p. 12) is groundless. To the contrary, the then-existing split which prompted Justice White to author his dissent from the dismissal has greatly intensified. The continued enactment of statutory damages "caps" among the States and the divided treatment of these statutes by the State appellate courts only reinforce Justice White's conclusion that "[t]he issue is important, and is deserving of this Court's review." 474 U.S. at 895.

CONCLUSION

A review of the record in both the trial court and the Missouri Supreme Court amply demonstrates that the two (2) federal questions presented here were well preserved for purposes of this Court's jurisdiction. Respondents have made no credible challenge to any of the legal or factual underpinnings which warrant discretionary review in this Court. The substantial split of authority attests to the extensive percolation of these issues and their ripeness for resolution in this Court.

Petitioners respectfully urge this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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November 3, 1992

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INDEX TO APPENDICES

Page

APPENDIX A

Excerpts From Appellants' Brief Filed In The Supreme Court Of Missouri (October 24, 1991) 1a

APPENDIX B

Appellants' Motion For Rehearing Filed In The Supreme Court Of Missouri (June 3, 1992) 38a

APPENDIX C

Respondent Children's Mercy Hospital's Suggestions In Opposition To Appellants' Motion For Rehearing Filed In The Supreme Court Of Missouri (June 10, 1992) 44a

APPENDIX D

Excerpts From Respondent Children's Mercy Hospital's Brief In The Supreme Court Of Missouri (November 26, 1991) 48a

APPENDIX E

Excerpt From Respondent's Jelinek's Brief Filed In The Supreme Court Of Missouri (November 26, (1991) 53a

APPENDIX F

Excerpts from Suggestions of Defendants Children's Mercy Hospital, Cindy Dooley, R.N., and Susan Roushar, R.N. In Opposition To Plaintiffs' Motion To Bar Enforcement Of Chapter 538, V.A.M.S. (February 8, 1991) 55a

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

Consolidated Case Nos. 73867, 74139

NICOLE ADAMS, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,

Appellants,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

Appeal from the Circuit Court of
Jackson County, Missouri, Division 6

THE HONORABLE JOHN R. O'MALLEY,
Circuit Court Judge

APPELLANTS' BRIEF

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* * * *

ARGUMENT

I. THE TRIAL COURT ERRED BY GIVING EFFECT TO CHAPTER 538 OF THE MISSOURI REVISED STATUTES IN ITS JUDGMENT ENTRY OF MARCH 14, 1991 BECAUSE (A) PLAINTIFFS ARE SEVERELY AND IRREPARABLY HARMED BY THE TRIAL COURT'S APPLICATION OF (1) SEC. 538.210 LIMITING NON-ECONOMIC DAMAGES TO $430,000.00 PER SEPARATELY INSURED DEFENDANT, (2) SEC. 538.230.1 PERMITTING MALPRACTICE DEFENDANTS TO APPORTION FAULT TO RELEASED PARTIES, (3) SEC. 538.230.2 MODIFYING JOINT AND SEVERAL LIABILITY, (4) SEC. 538.220 PERMITTING PAYMENT OF FUTURE DAMAGES IN PERIODIC OR INSTALLMENTS, AND (5) SEC. 538.300 BARRING APPLICATION OF THE PRE-JUDGMENT INTEREST RULE, SEC. 408.040, TO MEDICAL MALPRACTICE DEFENDANTS AND (B) THESE PROVISIONS OF CHAPTER 538 VIOLATE SPECIFIC GUARANTEES OF THE MISSOURI CONSTITUTION OF 1945 WHICH ARE (1) THE OPEN COURTS AND CERTAIN REMEDY WITHOUT DELAY PROVISION, ART. I, SEC. 14, (2) THE RIGHT OF TRIAL BY JURY, ART. I, SEC. 22(A), (3) EQUAL RIGHTS AND OPPORTUNITIES, ART. I, SEC. 2, (4) DUE PROCESS OF LAW, ART. I, SEC. 10, (5) THE SPECIAL LAW PROVISION, ART. III, SEC. 40(28), (6) THE SPECIAL PRIVILEGES OR IMMUNITIES CLAUSE, ART. I, SEC. 13, (7) THE ONE SUBJECT REQUIREMENT, ART. III, SEC. 23, AND (8) THE SEPARATION OF POWERS, ART. II, SEC. 1

Now before this Court is an action involving every parent's worst nightmare: a normal, healthy, happy

child enters the hospital for a minor procedure and leaves severely crippled and multiply handicapped—in this instance, blinded, severely brain damaged, and neurologically impaired. A lawfully constituted jury under the watchful eye of a careful trial judge determined that fair and just compensation to this child for the harm inflicted upon her was $19,750,732.00.

This Court needs to decide whether Nicole Adams and future malpractice victims are to retain the benefits of the common law approach to justice, a decision of tremendous importance and significance to Missouri citizens. The question presented is whether various provisions of the Missouri Medical Malpractice Statute of 1986 are constitutional under the Missouri and United States Constitutions. By authority, reason, and in the interests of justice, Appellants herein respectfully urge this Honorable Court to strike down these unjust laws and to reaffirm this Court's historical and constitutional role as the guardian of individual rights and liberties in our free society.

* * * *

3. The Provisions of Chapter 538 Violate the Missouri Constitutional Guarantee of Equal Rights and Opportunities Under the Law

Section 2 of Article I of the Missouri Constitution, which is the Bill of Rights, provides as follows:

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; *that all persons are created equal and are entitled to equal rights and opportunities under the law;* that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Missouri Constitution of 1945, Article I, Section 1 (Emphasis added). The challenged provisions of Chapter 538 violate the Equal Rights and Opportunities provision of Article I, Section 2, because these provisions impose discriminatory treatment on one particular class of tort victims, those unfortunate enough to be injured by negligent medical practitioners. Moreover, Section 538.210, the "capping" provision, creates a discriminatory sub-class of persons within the class of medical malpractice victims, whose non-economic damages are fairly and reasonably found by a jury to be in excess of the statutory "cap." By reason of this dramatic and arbitrary difference in the quality of justice which victims of medical malpractice may receive compared with victims of any other actionable negligence, Nicole Adams respectfully submits that the challenged provisions deny her equal rights under the law in violation of the constitutional guarantees set forth in Article I, Section 2.

In considering an equal protection challenge to a statute, the Court "may consider both the information before the legislature when it adopted the statute and information currently available." *Collins v. Director of Revenue*, 691 S.W.2d 246, 250 (Mo.banc. 1985); *see also State v. McManus*, 718 S.W.2d 130, 131 (Mo.banc. 1986); *Leary v. United States*, 395 U.S. 6 (1969).

A review of the materials available to the legislature at the time of the alleged medical malpractice "crisis" and based on data and other studies generated in the intervening five (5) years clearly establishes that there was no legitimate basis for the legislature's separate classification of medical malpractice victims regardless of the particular Equal Protection test utilized.

A. Analysis of the "Presumptive" Objectives of Chapter 538 In Relation to a "Medical Malpractice Crisis"

The Missouri Medical Malpractice Act was the result of a compromise negotiated between the Missouri Associa-

tion of Trial Attorneys and a coalition of health care providers.[17] Neither Senate Bill No. 663, nor the statutory language itself, gives any explicit objectives, goals, or interests to which the legislation was directed. *See* S.B. 663 (Legal File 107.32). Accordingly, one may only put forth a list of "presumptive" goals of the legislation given the context of the public discussion during 1985-86 and by sampling the explicit legislative purposes set forth in similar statutory schemes enacted by other states.

These legislative objectives include reduction or elimination of frivolous malpractice claims, assuring availability of health care, decreasing the expense and complexity of malpractice litigation, reducing re-insurance costs for malpractice liability carriers, and lowering malpractice insurance premiums for physicians, hospitals and other health care providers.

It becomes difficult to assess the legitimacy of the legislature's objective in enacting a statute when neither the bill nor the legislation as passed contains any mention of its purposes. However, even if given the benefit of the aforementioned "presumptive" goals, information available from the mid-1980's and data accumulated since then establish no rational basis for the harsh statutory treatment of medical malpractice victims in comparison to other tort victims under any level of constitutional scrutiny.

The number of newly licensed physicians over the past decade has seen a fifty-five percent (55%) increase on a yearly basis since 1980. State Board of Registration for the Healing Arts, Information Summary, October 7, 1991. The current number of licensed physicians in Missouri

[17] *See* Terry, "*Missouri's Malpractice Concord*," 51 Mo.L.Rev. 463-66 (1986). The health care coalition was made up of the Missouri Hospital Association, the Missouri Medical Association, and the Missouri Association of Osteopathic Physicians and Surgeons. *Id.* at 463; Transcript of Joint Meeting of Trial Attorneys and Various Health Care Providers, November 27, 1985 (Legal File, p. 107.40).

is 11,458 and almost fifteen percent (15%) of those were newly licensed in 1990. The number of physician licenses issued each year in the State of Missouri has increased steadily from 1,103 in 1980 to 1,302 in 1985 to a total of 1,706 in 1990. *Id.* Contrary to any conceivable shortage of physicians, the argument may be made that we are approaching a physician glut.[18] Kirchner, *Whatever Happened to the Great Doctor Glut?*, Medical Economics (June 5, 1989), at p. 138.

As a reflection of the overall population of Missouri, the number of medical malpractice claims has remained remarkably level. In 1981, the total number of medical malpractice claims throughout the entire state was 832. Medical Malpractice In Missouri, 1983, Statistical Section, Missouri Division of Insurance, p. 1. While the number of claims rose to 1,301 in 1982, the level dropped back down to 1,118 in 1983 *Id.*

With respect to any "crisis" of runaway jūries or "excessive" awards, the statistical information from our own State does not bear this out. For the three (3) years 1984-1986 inclusive, the *total* number of claims paid which exceeded $1,000,000.00 was 13 Medical Malpractice in Missouri, 1984-86, Statistical Section, Missouri Division of Insurance (January 1988), pp. 1-2. For all of the years 1984-86, the number of claims paid in an amount over $100,000.00 were 70, 113, and 136, respectively. *Id.*

Furthermore, the percentage of malpractice claims closed without any payment whatsoever remained very stable between 1984 and 1986, ranging from 63.8% to 67.5%. In other words, in only 32-36% of all malpractice claims made was any payment issued. *Id.* The number of

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[18] Nationwide, despite steady increases in malpractice insurance costs from 1975 to 1988, the number of physicians in the U.S. increased from 409,000 to 546,000, causing concern about an oversupply of doctors. Kirchner, *supra*, at p. 140.

paid claims in 1985 and 1986 were 609 and 606, respectively. *Id.* at p. II.

The number of medical malpractice claims which were closed with some payment continued an expected rise with increase in population in 1987 and 1988 with a reported 633 and 684, respectively. Medical Malpractice in Missouri, 1986-88, Statistical Section, Missouri Division of Insurance (October 1989), p. 1. The percentage of malpractice claims closed without payment remained stable over the 3-year period, 67.3% for 1986, 67.4% for 1987, and 63.8% for 1988. *Id.* The number of paid claims over $100,000.00 continued to be a small percentage of total paid claims and an exceedingly small percentage of total claims. In 1986, there were only 144 such paid claims, down to 105 in 1987, and then to 142 in 1988. *Id.* Appellants are unaware of any Missouri data revealing the number of incidents of injury-producing malpractice for which no claim was ever made. One well-documented study concluded that the vast majority of provable medical malpractice claims are simply never brought.[19]

For the most recent period of time for which information is available, the Missouri Division of Insurance reports a substantial decline in the percentages of jury outcomes in favor of the plaintiff. Missouri Medical Malpractice Insurance Report, 1988-89, Missouri Department of Insurance, September 1991, p. 2. In 1983, 50.6% of the outcomes were in favor of the plaintiff, where in 1990 that figure had dropped to 35.3%. These statistics continue to refute any epidemic of "runaway juries." In

[19] A recent study of New York hospitals conducted by the Harvard School of Public Health concluded that an enormous percentage of meritorious malpractice claims are never brought by the victim or the victim's family. Harvard Medical Practice Study, "*Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York,*" (February 1990) (Legal File, p. 107.292) ("eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State"). *Id.* at 6.

fact the opposite is true: the number of paid claims in excess of $1,000,000.00 was 4 in 1988, 2 in 1989, and 4 in 1990. *Id.* at 8-12. This hardly smacks of a "crisis."

Given the steady increase in the number of licensed physicians in Missouri each year since 1980 and the claims experience as documented by the Missouri Department of Insurance, there appears little objective documented data in support of a true "crisis." That much of the hysteria was created by malpractice insurance carriers, rather than the providers themselves, is clear in hindsight. *Missouri's Malpractice Concord*, *supra*, at 463 & 463 n. 44-47.[20]

The Missouri experience closely tracks that of other states across the country. A survey of the General Accounting Office concluded that of 73,472 malpractice claims closed in 1984, only 759 (approximately one percent) received in excess of $100,000.00 for non-economic damages. General Accounting Office, *Medical Malpractice: Characteristics of Claims Closed in 1984*, 49 (1987).

Studies which look at the relationship between "capping" damages and insurance savings have found that the savings from tort reform range from "marginal to non-existent." Claim Evaluation Impact, National Overview 4 (ISO, 1987). The study concluded that caps on non-economic damages resulted in no savings whatsoever in most situations. *Id.* at 75.

Two of the largest medical malpractice carriers conducted a study which concluded that a $250,000.00 cap on non-economic damages would be applicable to so small a number of cases that it would result in no significant savings. *Reprinted in* National Insurance Consumers Organization, *The Florida Experience* (1987). Indeed, according to St. Paul Fire & Marine Insurance Company, "nowhere has it been proved that tort reform will affect

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[20] *See also* authorities cited at note 25 and pages 74-75, *infra*.

our loss costs." *Why Tort Reform Doesn't Reduce Malpractice Premiums*, Medical Economics (October 19, 1987), at 28; *see also* Study, General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, "*Case Study on California*" 12, 22 (Dec. 1986).

The median income of Midwest doctors in 1988 was $241,070.00. Owens, Earnings Survey, Medical Economics, September 4, 1989, at 141. The median malpractice premium for physicians in the Midwest in 1988 was $11,330.00.[21] Paxton, *Just How Heavy is the Burden of Malpractice Premiums?*, Medical Economics, Jan. 16, 1989, at 182. Professional liability insurance is simply a cost of doing business.[22] To suggest that physicians would leave the practice of medicine at even two to three times that amount of premium, and willingly sacrifice such a handsome income attained after many years of education, is simply unreasonable per se. These studies and statistics firmly belie the existence of any "crisis" in health care in the State of Missouri.

B. Strict Scrutiny Analysis Is Applicable Where the Statute Affects "Fundamental Rights" Or a "Suspect Class"

This Court repeatedly has stated that the "first step in addressing [an] equal protection claim" is to deter-

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[21] Not surprisingly, the specialties with the highest earnings paid the highest insurance premium. In 1988, the *median* gross salary for a cardiovascular surgeon was $529,170.00, with a net after expenses of $372,500.00. Owens, *supra*, at 147. The median insurance premium in that specialty in 1988 was $32,120.00. Paxton, *supra*, at 172. The median insurance premium for *all* surgical specialties was a mere 7.4% of gross income. Paxton, *supra*, at 168.

[22] A GAO Study concluded that malpractice insurance premiums make up one of the smallest categories of physician expenses. General Accounting Office, *Medical Malpractice: Insurance Costs Increased But Varies Among Physicians and Hospitals* (September 1986), at 2-3. It ranked far below payroll, medical supplies, and general office expenses, comprising only nine percent (9%) of total professional expenses. *Id.* at 3.

mine whether the challenged legislation impinges upon, impairs, or touches a "fundamental right" or operates to the disadvantage of a "suspect class." *State Board of Registration v. Giffen*, 651 S.W.2d 475, 471 (Mo.Banc 1983); *see also Belton v. Board of Police Commissioners*, 708 S.W.2d 131, 139 (Mo.banc. 1986); *State v. Bolder*, 635 S.W.2d 673, 682 (Mo.banc. 1982), *cert. denied*, 459 U.S. 1137 (1983); *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339, 347 (Mo. banc. 1978) (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 [1976]). "The presumption of constitutional validity vanishes" when the legislation impinges upon a "fundamental right." *Mahoney v. Doerhoff Surgical Services, Inc.*, *supra*, at 512.

The challenged provisions of Chapter 538 squarely affect appellants' constitutionally guaranteed rights of trial by jury and to open courts and a certain remedy. These rights have been held by Missouri courts to be "fundamental." *Scott v. Young*, *supra*, (jury trial); *Lohse Patent Door Co. v. Fuelle*, *supra* (certain remedy).

The test for triggering the "strict scrutiny" analysis is not total abolition of a "fundamental right" but simply whether that fundamental right is in any way infringed upon or impaired. *Labor's Educational and Political Club-Independent v. Danforth*, *supra*, at 348. The "fundamental right" itself need not even be directly impacted on. There need only be an "indirect impact" on a fundamental right in order to trigger a strict scrutiny analysis. *Id.* According to the U.S. Supreme Court, strict scrutiny is triggered if the statute at issue merely comes in conflict with a fundamental right:

> [T]he Court has applied strict scrutiny to state or federal legislation *touching upon constitutionally protected rights*. Each of our prior cases involved legislation which "deprived" "infringed" or "interfered" with the free exercise of such *fundamental personal right or liberty*.

San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 38-39 (1973) (Emphasis added).

In *Labor's Educational and Political Club-Independent v. Danforth*, *supra*, the Missouri Supreme Court was called upon to review the constitutionality of the Campaign Finance and Disclosure Act which contained a provision forbidding any candidate who had violated the act from becoming a candidate for ten (10) years following such violation. *Id.* at 342-43.

In deciding whether to apply the strict scrutiny or rational relationship test, the Court noted that while the right of a person to seek public office is not necessarily a "fundamental right," the right to vote most assuredly is. *Id.* at 348. The Court recognized that "a limitation on the right to be a candidate has at least an *indirect impact* on one of the most basic fundamental rights—the right to vote." *Id.* at 348 (citing *Williams v. Rhodes*, 393 U.S. 23, 31 [1968]) (Emphasis added).

Thus, in view of the fact that the act "has a real and appreciable impact on the right to vote," the Court held that a strict scrutiny analysis was required. *Id.* Under that analysis, the Court found that the classification scheme was "arbitrary and unreasonable and does not further the purpose of the act" and held it to unconstitutionally violate Article I, Section 2, the Equal Rights and Opportunities Provision of the Missouri Constitution. *Id.*

Chapter 538 also creates a "suspect class" of persons injured by the acts of health care providers and imposes upon them burdens and conditions affecting their fundamental rights which are not imposed upon other members of the larger class of injured persons in general. In that a "suspect class" exists, strict judicial scrutiny of the offending statute is required by the Missouri Constitution. *State Board of Registration for the Healing Arts v. Giffen*, *supra*, at 479; *State v. Bolder*, *supra*, at 682.

Future medical malpractice victims constitute a "suspect class" deserving of strict scrutiny equal protection,

in view of their physical disabilities, political powerlessness, and functional dissimilarity from other tort victims. In defining a suspect class, the United States Supreme Court has stated that any classification should be treated as suspect where the "class is . . . saddled with such disabilities, . . . or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian and political process." *San Antonio Independent School District v. Rodriguez, supra*, at 33-34.

By definition, medical malpractice victims have extraordinary disabilities and in that this legislation harms those who are most severely injured, that class of person qualifies as a "suspect class" deserving of strict scrutiny protection. Furthermore, it is difficult to imagine a group of more "political powerlessness" than nameless, presently unidentifiable victims of severe medical negligence. For these additional reasons, strict scrutiny analysis is appropriate.

A strict scrutiny analysis requires the proponent of the legislation to show that the legislature has a "compelling" state interest in the classification scheme selected. *Labor's Educational and Political Club-Independent v. Danforth, supra*, at 348-49. It places a "very heavy burden of justification" on the proponent of the legislation to prove that it is "necessary to promote a compelling state interest." *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

Courts have applied a strict scrutiny analysis in invalidating their state's "capping" legislation treating certain injury victims differently from other victims of torts. *Simon v. St. Elizabeth Medical Center, supra*, at 911-12; *Graley v. Satayathem*, 343 N.E.2d 823, 838-39 (Ohio C.P. 1976); *Pfost v. State of Montana, supra*, at 501-02.

Strict scrutiny equal protection analysis was invoked by the Ohio court in *Graley v. Satayathem, supra*, as follows:

> There obviously is "no compelling governmental interest" unless it be argued that any segment of the

> public in financial distress be at least partly relieved of financial accountability for its negligence.

Id. at 837. In view of the nature of the rights at stake in this controversy, strict scrutiny of the Missouri medical malpractice legislation is called for.

C. Application of an "Intermediate" or "Heightened" Level of Scrutiny to Chapter 538 is Warranted Given the Nature of Rights Impaired

In view of Chapter 538's substantial erosion of the constitutional protections afforded this one particular class of tort victims, Appellants respectfully urge this Court to apply, at minimum, an enhanced or "heightened scrutiny" of the societal justifications for the legislation. Even if the right to pursue fair compensation for bodily injury were not deemed "fundamental" by this Court so as to trigger a "strict scrutiny" analysis, the constellation of rights involved merits greater constitutional protection than that afforded by the "rational basis" test. This "intermediate" level of scrutiny as applied to this legislation recognizes that a prime function of our social order is to protect the health and well-being of individual citizens and to provide just compensation to human beings who have suffered ruinous physical injury due to the fault of others.

Many of the courts striking down similar medical malpractice legislation on equal protection grounds have applied the "intermediate" or "heightened level of scrutiny" to the various legislatures' handling of the purported malpractice "crisis." *Jones v. State Board of Medicine*, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); *Carson v. Maurer*, *supra*, at 830; *Brannigan v. Usitalo*, *supra*, at 1234; *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985); *Arneson v. Olson*, *supra*, at 133-34; *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986).

The U.S. Supreme Court has applied a "heightened" level of scrutiny where statutes applied either to "quasi-fundamental rights" or "semi-suspect" classes. *Lalli v. Lalli*, 439 U.S. 259, 269 (1978); *Craig v. Boren*, 429 U.S. 190, 240 (1976), *rehearing denied*, 429 U.S. 1124 (1977); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Under this heightened level of scrutiny, the Court looks to whether a "substantial relationship" exists between the means and ends of the statutory classification scheme. *Id.* Rather than a "rational relationship" to the legislative purpose, the proponent must demonstrate that the classification created by the challenged statute is "reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation to the object of the legislation*" for the statute to satisfy state Equal Protection. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (Emphasis added). Accordingly, this "heightened" level of judicial scrutiny calls for the court to independently examine the basis for the statutorily-created classification scheme. *Arneson v. Olson*, *supra*, at 133; *Carson v. Maurer*, *supra*, at 831.

The Supreme Court of Missouri has recognized that the infringement of a fundamental right or discrimination on the basis of a quasi-suspect classification would warrant "heightened" or "intermediate level" scrutiny Equal Protection analysis, rather than the "rational basis" test. *State v. Walsh*, 713 S.W.2d 508, 510 (Mo.banc. 1986); *see also State of Missouri v. Taylor*, 726 S.W.2d 335, 336 (Mo.banc. 1987).

In noting that the right to recover for personal injuries was "an important substantive right," the Supreme Court of New Hampshire applied the "fair and *substantial* relationship" test in invalidating the medical malpractice statute under review:

> We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to

> a more rigorous judicial scrutiny than allowed under the rational basis test.

Carson v. Maurer, supra, at 830 (Emphasis added).

Assuming, arguendo, that malpractice insurance rates were temporarily high or that physicians were relocating because of high medical malpractice insurance premiums, that in and of itself is no constitutionally permissible objective to trample upon cherished rights. Notwithstanding the extreme cycles of the casualty insurance industry, all businesses and professions have down cycles but, as one court concluded, that does not provide a legitimate basis for legislation which props up the favored class to the great detriment of the disfavored class:

> To articulate the requirement is to demonstrate its absurdity, for at one time or another, every type of professional business undergoes difficult times, and *it is not the business of government to manipulate the law so as to provide succor to one class, the medical profession, by depriving another, the malpracticed patients, of the equal protection mandated by the Constitution.*

Graley v. Satayathem, supra, at 837 (Emphasis added).

As stated by the Supreme Court of New Hampshire in finding its state's medical malpractice statute violative of equal protection under a "more rigorous" judicial scrutiny:

> It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.

Carson v. Maurer, supra, at 837.

In analyzing whether the challenged sections of Chapter 538 have a *substantial* relationship to the "presumptive" objective of lowered insurance costs, one must lose

sight of the principal societal function of insurance. Insurance spreads the risks of harm among many in order to prevent an unfortunate few from suffering dire personal financial hardship. The challenged legislation renders this principle topsy-turvy by favoring the most culpable insurance premium payers over those upon whose behalf the insurance exists.

Some courts have questioned why the legislature did not explore other avenues to accomplish its purpose which would not have infringed so deeply upon the constitutional rights of injured persons. *Waggoner v. Gibson*, 647 F. Supp. 1102, 1104-05 (N.D.Tex. 1988) (no explanation "why the only legislative response to the insurance 'crisis' is to limit the recoveries of malpractice claimants with the most meritorious and substantial suits, and is silent as to other conceivable avenues of investigation."); *Detar Hospital, Inc. v. Estrada, supra*, at 366 (other causal factors may be behind the "malpractice insurance crisis"). In seeking to accomplish the presumptive goals of Chapter 538, the Missouri legislature could have utilized other means which would not have the deleterious effect of trampling upon persons already maimed and crippled by malpractice.

A far more equitable means of addressing any medical malpractice concerns would be to single out and address those physicians and other providers who repeatedly are found liable for malpracticing upon their patients. Increasing the medical training for such physicians or imposing the burden of higher malpractice insurance costs more directly on repeat offenders or spread throughout the general public would be far more equitable than placing the entire burden on the innocent victims.

The expressed legislative purposes of the North Dakota Medical Malpractice Act were similar to the presumptive purposes of the Missouri legislation: to assure the availability of medical and hospital services, to eliminate the expenses incurred relating to the filing of non-meritorious

medical claims, and encouraging competent physicians to remain in practice. *Arneson v. Olson*, *supra*, at 135. Applying a "more rigorous scrutiny" to whether the "caps" provision related to these goals, the Court concluded as follows:

> *Does the limitation of recovery of seriously damaged or injured victims of medical negligence promote these aims? We hold that it does not and that it violates the Equal Protection Clause of the State Constitution.*

Id. at 135 (Emphasis added). For precisely these same reasons, Section 538.210 should be invalidated as none of the "presumptive" goals of the Missouri legislation even remotely warrants the penalties meted out to persons like Nicole Adams.

D. Under the "Rational Relationship" Test No Legitimate State Interest is Served by Legislative Discrimination Against Medical Malpractice Victims

The "rational relationship" test requires the Court to assess whether any legitimate state interest is promoted by the classification scheme created by the statute. *State v. Brown*, 599 S.W.2d 498, 504 (Mo.banc. 1980), *cert. denied*, 449 U.S. 985 (1980); *see also Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972). When this statutory scheme is carefully reviewed in terms of the objectives sought, it becomes clear that singling out the class of persons most catastrophically injured and disabled by health care providers for disparate treatment has no reasonable or legitimate relationship to the presumed state interest of reducing malpractice insurance costs or increasing the availability of health care.

The overwhelming body of data to the effect that the bases for Chapter 538 were substantially flawed and short-lived should serve to overcome any presumption of the statute's constitutionality. As a result, this Court

should set aside any tendency to customarily defer to the legislative judgment in this instance and conduct a careful Equal Protection scrutiny of the legislation's constitutionality as is befitting of this Court's critical role in our government.

Applying the rational relationship test, a number of other courts have determined that a legislative act which "caps" damages is an unconstitutional denial of equal protection. *Waggoner v. Gibson, supra; Wright v. Central DuPage Hospital Association, supra; Arneson v. Olson, supra; Carson v. Maurer, supra; Morris v. Savoy, supra.*

The fact that physicians and hospitals would have to pay higher premiums for liability coverage is *not* a legitimate basis to deny the full measure of compensation to the persons they injure. The interest of the state in protecting the income of physicians is not a legitimate goal when to do so results in a measure which is not shared equally among consumers of health care, but to be born entirely by those consumers who receive *bad* health care. Fearing a "crisis," the legislature has been induced to drastically diminish doctors' and hospitals' accountability for their negligence.

In that one of the historic functions of the tort system is to provide incentives for careful actions, in addition to compensating the injured, the logical and unavoidable result of Chapter 538 is to *lower* the standard of practice of medicine in Missouri because of the limited liability provisions. On this precise point, the Supreme Court of Wyoming observed that:

> If the medical professional is less accountable than formerly because of the special treatment afforded . . . then a relaxation of medical standards may occur with the public as the victim. To find that the protection and special dispensation given to health care delivery tortfeasors . . . is in the best interest of public health is illogical to the point of irrationality.

Hoem v. State, 756 P.2d 780, 783-84 (Wyo. 1988) (citing to *Boucher v. Sayeed*, 459 A.2d 87, 94 [R.I. 1983]).

A "presumptive" objective of the Missouri legislation was to reduce the cost of litigation because of the filing of nonmeritorious medical malpractice claims. That objective is not even remotely applicable to the case at bar. In Dr. John Ryan from Harvard and Dr. Phillip Larson from Stanford. Appellants brought to trial two (2) of the most respected anesthesiologists in the country, both of whom testified that clear malpractice was committed.

Furthermore, it is difficult to make any sensible argument that that objective is addressed by the challenged provisions of the legislation. To this specific issue, in the process of concluding that the "rational relationship" test was failed, it was stated:

> The assumption, which has not necessarily been tested, is that unjust claims are being prosecuted successfully, and this assumption may be a fallacy.

Hoem v. State of Wyoming, *supra*, at 788 (Thomas, J. concurring.) In fact, given the extraordinary real and potential effect of this Act on horribly injured malpractice victims, it is difficult to contrive *any* legislative objective which would fairly justify further burdens on this already severely burdened class. This class of individuals by definition already has been disabled and impaired and should not be placed on the scrap heap of society in favor of the enhanced social welfare of doctors and their insurers.

Applying the "cap" only to non-economic injury does not save the provision from Equal Protection attack. As is clear by the statutory definition of "economic damages" which include both medical expenses and lost income, this is merely compensation for products and services specifically needed because of the injuries and to replace income lost because of the inability to work due to these injuries. Economic loss alone does not and cannot fully compensate

an injured person. When one has suffered an injury which will produce life-long quadriplegia, blindness, severe mental retardation, or loss of limb, it is the function of non-economic damages to compensate a human being for that loss in society's best effort to make that person whole.[23]

In view of the proof of Nicole Adams' injuries at trial, no court in America would hold that her compensatory, non-economic damages should be remitted to $430,000.00 or $860,000.00. If Nicole Adams had sustained precisely the same injuries in a motor vehicle accident, by an exploding tire rim, or by any other actionable negligence, she would have the benefit of the jury's finding of full and and fair compensatory damages. That she should be caused to suffer more because she was injured at the hands of a physician is so arbitrary as to defy common sense.

As originally enacted, Section 538.300 provided that *both* pre- and post-judgment interest provided by Section 408.040 would be verboten for medical malpractice plaintiffs. In amending the law two (2) years later solely to permit malpractice victims' to recover *post*-judgment interest, the Missouri legislature plainly recognized that the removal of post-judgment interest for this one class of plaintiffs was an unconstitutional violation of equal protection. Section 538.300 (1988, as amended).

In identical language found in both the House and Senate bills, the measure was declared an emergency act:

> Because immediate action is necessary *in order to remedy the unconstitutionality of a provision of law as it relates to post-judgment interest and its applicability to medical malpractice actions*, . . .

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[23] "[F]or a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from non-economic damages." *Fein v. Permanente Medical Group*, 695 P.2d 665, 689-90 (Cal. 1985) (Bird, C.J., dissenting).

H.B.No. 1701; S.B. 425 (1988) (Emphasis added). There exists absolutely no distinction, constitutional or otherwise, between pre- and post-judgment interest so as to justify the allowance of one and not the other for malpractice plaintiffs. Moreover, it is impossible even to articulate a reasonable basis between the abolition of prejudgment interest on behalf of malpractice plaintiffs and any of the "presumptive" objectives leading to the passage of Chapter 538.

The statutory provision permitting malpractice defendants to satisfy a judgment of future damages in periodic or installment payments, Section 538.220, also flunks equal protection scrutiny. The clear purpose of this provision is to permit those physicians lawfully found to have negligently caused injury, or more precisely their insurance cariers, to reduce the cost of hurting people. By permitting the insurance carrier to retain the ability to pay out a future award over time the present value cost of paying the judgment is significantly reduced.[24]

In finding such payout provisions in medical malpractice statutes a denial of equal protection, other courts have observed that:

> Finally, a statute which singles out seriously injured malpractice victims whose future damages exceed $50,000.00 and requires one class to shoulder the burden inherent in a periodic payment scheme from which the general public benefits offends basic notions of fairness and justice.

Carson v. Maurer, *supra*, at 838. By all rights, the award represented by the jury's verdict becomes the property of

[24] Section 538.220(3) provides that the court "may require" a judgment debtor to post security or to purchase an annuity. In view of the risk of any casualty or surety company dissolving or going bankrupt, it makes little sense to impose this additional concern on the malpractice tort victim when all other tort victims receive the immediate right to collect a judgment in full.

the plaintiff when she obtains a judgment. Yet, by application of this arbitrary statutory scheme, the rights to that property remain with the judgment debtor. Nicole Adams is deprived of the right to use that sum of money in the manner which she chooses. She cannot accumulate interest on that property for her own benefit. This statutory provision fails even the most permissive equal protection analysis simply because it has no conceivable connection with a proper goal of providing safe and competent medical care to the citizens of the State of Missouri.

Other courts have recognized the extraordinary inequities of a program which further debases those whose lives are already devastated. In holding that the Ohio Medical Malpractice Statute was an unconstitutional violation of equal protection, the Court commented that:

> *Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceivable, but shocking to this Court's conscience.*

Duren v. Suburban Community Hospital, supra, at 1362-63 (Emphasis added). Similarly, in striking down the Wyoming statute, the Supreme Court of Wyoming stressed that the legislative objectives had no conceivable relationship to the means selected:

> It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health.

Hoem v. State of Wyoming, supra, at 789-90.

Having analyzed the discriminatory effects of the Act's classification scheme and the purported justification of the Act in view of the materials from the Statistical Sec-

tion of the Missouri Division of Insurance referenced earlier, this Court may question whether there ever existed a "medical malpractice crisis" of any proportion. In reviewing medical malpractice legislation on equal protection grounds, courts commonly take judicial notice of facts showing the existence *vel non* of any such "crisis."[25] *Lucas v. U.S.*, at 691; *Boucher v. Sayeed, supra*, at 92-93; *Young v. Alberts*, 342 N.E.2d 700, 704 (Ohio C.P. 1975); *Arneson v. Olson, supra* at 136; *Hoem v. State, supra*, at 783. The Alabama Supreme Court concluded just last month that "the correlation between the damages cap imposed by [the Act] and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote." *Moore v. Mobile Infirmary Association, supra.*[26]

The Supreme Court of Texas was highly skeptical of the relationship between statutory "caps" in medical negligence cases and insurance rates:

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[25] A number of courts which have judicially noticed the facts underlying a purported malpractice "crisis" have determined that no "crisis" ever truly existed. *Arneson v. Olson, supra* at 136 ("there did not appear to be an availability or cost crisis in this State."); *Hoem v. State, supra*, at 783 ("we note the absence of the record of any evidence demonstrating the existence of any such [malpractice] crisis in Wyoming or elsewhere."); *Crowe v. Wigglesworth*, 623 F.Supp. 699, 706 (D.Kan. 1985) ("some courts have found that the highly touted malpractice insurance crisis of 1975-76 was limited to that time period, is no longer an 'obvious' crisis, and may not now continue to be used to justify imposing separate and unequal treatment on medical malpractice litigants"); *Stephens v. Snyder*, 631 P.2d 222, 236 (Kan. 1981) (J. Herd dissenting) ("We now know the propaganda campaign mounted to obtain the legislation was overstated. The so-called crisis in availability of malpractice insurance did not exist . . ."); *Kenyon v. Hammer*, 688 P.2d 961, 975-76 (Ariz. 1984) ("There is 'authority to support the proposition' that there was no real malpractice crisis but merely hysteria engendered by a rise in premiums by insurance companies . . .").

[26] "By contrast, the burden imposed by [the Act] on the rights of individuals to receive compensation for serious injuries is direct and concrete." *Id.*

> One independent study has concluded that there is no relationship between a damage cap and increases in insurance rates [thereby reducing available health care] *given that less than .6% of all claims brought are for over $100,000.00.*

Lucas v. U.S., *supra*, at 691 (citing to *Sumner*, The Dollars and Sense of Hospital Malpractice Insurance, AFT Books 1979) (Emphasis added).

In addition to these findings by courts themselves, a number of reports and studies have determined that the alleged malpractice "crisis" had no relationship whatsoever with the function of the tort system, and was attributable entirely to market conditions and mismanagement of risk and funds by the insurance carriers themselves. Sepler, *Professional Malpractice Litigation Crises: Danger or Distortion?*, 15 Forum 493 (1980); Kindregin and Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 St. Mary's L.J. 673 (1987); D. Luisell & H. Williams, *Medical Malpractice*, Sec. 20.07 (Supp. 1979); Aitkin, *Medical Malpractice: The Alleged 'Crisis' In Perspective*, 637 Ins. L.J. 90, 96 (1976); Oster, *Medical Malpractice Insurance*, 45 Ins. Counsel J. 228, 231 (1978); General Accounting Office, *Medical Malpractice: A Framework for Action*, 32, (1987); Crane, *Does Your Malpractice Insurer Owe You A Refund?*, Medical Economics, October 16, 1989, at 60; Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonzaga L. Rev. 15 (1986); Schroater & Rutzick, *"Tort Reform": Being an Insurance Company Means Never Having to Say You're Sorry*, 22 Gonzaga Law Review 31, (1987). The highly respected and financially independent publication, Consumer Reports, reported that "[i]nsurers are spending millions of dollars—including $6.5 million through the Insurance Information Institute—to sell the idea of a 'lawsuit crisis.'" *"The Manufactured Crisis: Liability Insurance Companies Have Created A Crisis*

and Dumped It On You," Consumer Reports, Aug. 1986, at 544.

A comprehensive study prepared by the U.S. General Accounting Office concluded that any connection between "capping" damages and the cost of health care was "remote." General Accounting Office, *Medical Malpractice: No Agreement on the Problems or Solutions*, HRD-86-50 (February 1986, at 3). The GAO Study concluded that "no consensus among the interest groups [surveyed] that any of the reforms implemented in response to the situation experienced in the mid-1970's . . . had a major effect" on the cost of malpractice insurance. *Id.* at 3. Regardless of the fact that tort reform statutes, specifically including caps on damages, had been in operation for ten (10) years in some states, the GAO concluded that "from 1983 to 1985, total medical malpractice insurance costs for physicians and hospitals rose from $2.5 billion to $4.7 billion."[27] General Accounting Office, Medical Malpractice: Insurance Costs Increased But Varies Among Physicians and Hospitals (September 1986, at 2).

The Wyoming Supreme Court found that the facts relative to an alleged medical malpractice "crisis" required at least a healthy skepticism:

> Most state courts give considerable deference to the state legislature's specific declarations and statutes that such a crisis does exist and that the substantive portions of the statute are intended to alleviate that crisis. A better approach for those courts that have yet to decide the issue would be, however, to take a more skeptical attitude toward the evidence presented by the medical profession and the insurance industry . . . *proper scrutiny of the constitutional validity of*

[27] *See also* Sloan, *State Responses to the Medical Malpractice Insurance "Crisis" of the 1970's; An Imperical Assessment*, 9 J. Health Politics, Policy & Law, 629, 630 (1985) ("To date, no one has isolated the effects of specific legislative actions on either the price or availability of malpractice insurance.")

> *state legislation demands more than a perfunctory deferral to the legislature's conclusions regarding the existence of a health care crisis in the particular state.*

Hoem v. State, supra, at 784 (citing to Comment, "*Constitutional Challenges to Medical Malpractice Review Boards*," 46 Tenn.L.Rev. 607, 645 [1978]) (Emphasis added).

On the basis of the above discussion, it is more than questionable whether a "medical malpractice insurance crisis" ever existed. The only "crisis" came about because of a profit squeeze of the insurance carriers resulting in loud cries from the doctors and hospitals because of the resultant higher premiums. Nevertheless, even assuming the existence of such a "crisis" in the full proportions painted by the medical-insurance lobbies, no basis ever exists for compromising firmly entrenched constitutional protections. The Texas Supreme Court firmly stated in this regard that:

> Even assuming that such a "crisis" has a basis in fact, it is indisputable that constitutional protections are not suspended in time of even the most legitimate crisis . . . *Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry*; concerns about the latter cannot be allowed to overrun the former at the expense of those who prove at trial that they were most seriously injured by acts of malpractice.

Waggoner v. Gibson, supra, at 1107 (Emphasis added) (citing to *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 589 [1952]), where the U.S. Supreme Court established that constitutional protection sexist "in good and bad times"). The true "crisis" may very well be that too many physicians and surgeons are malpracticing upon and badly injuring too many patients.[28]

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[28] *See* Harvard Study cited at note 19, *supra.* One court balanced the alleged "crisis" versus constitutional rights as follows:

The provisions of Section 538.230 permitting an apportionment of fault to released parties fail any level of Equal Protection analysis. The language of the statute effectively gives defendants the option to apportion fault to released parties. Subsection 1 provides that: "The Court, *unless otherwise agreed by all the parties*, shall instruct the jury to apportion fault among such [released] persons . . ." Section 538.230.1 (Emphasis added). It would be the rare case indeed where a defendant would choose not to have fault apportioned given the circumstances that the released party has no counsel present to defend itself.

The acute unfairness of Section 538.230 lies in the fact that it prevents plaintiffs from obtaining the full amount of the recovery for "fair and reasonable compensation" determined by the jury. This provision grossly modifies one of the most fundamental concepts of tort law that:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

Restatement (2nd) of Torts, Sec. 875 (1965). The state interest or goals which prompted enactment of Chapter 538 are not nearly substantial enough to deny the beneficient aspect of the common law of joint and several liability to malpractice plaintiffs. Under Missouri's common law and prior statutory scheme, defendants always

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> There is no doubt that the plethora of medical malpractice suits represents a crisis situation, not only to the medical profession but to their insurance carriers as well. However, in this court's opinion, there is no crisis situation, short of civil insurrection, sufficient to deprive, water down or make less valuable the right to seek redress of grievances, to a dollar amount fully compensating one for his loss, through the medium of a free and unfettered jury trial.

Simon v. St. Elizabeth Medical Center, supra, at 911-912.

have been protected from paying an amount in excess of the jury award by application of a credit or "set-off" for any prior settlements. A defendant would owe nothing where the jury's verdict was less than the amount of a prior settlement or the totality of prior settlements.

Under our present tort system, a malpractice defendant simply cannot be found at fault *unless* his or her conduct is a proximate and legally sufficient cause of the plaintiff's injuries. MAI 21.01 [1988 Revision] (Verdict Directing—Actions Against Health Care Providers—No Comparative Fault); *Schiles v. Schaefer*, 710 S.W.3d 254 (Mo.App. 1986). The concept of "relative fault" was designed and is intended solely as a means to expeditiously resolve the question of contribution among joint tortfeasors. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 473-74 (Mo.banc. 1978).

Application of Section 538.230 alone denies to Nicole Adams the bulk of the jury's verdict *notwithstanding the fact that these defendants were judged to be at fault*:

Verdict for Nicole Adams	$19,750,732.00
Less: Released persons' or entities' equitable share of the total obligation pursuant to Subsection 538.230 and disregarding the "capping" provision (60% of $19,750,732.00)	—11,850,439.00
Total Judgment for Nicole Adams	$ 7,900,293.00

The fundamental difference between these two (2) methods is that Appellant is denied the full value of compensation lawfully determined by the jury because of the Act's dismantlement of joint and several liability for malpractitioners; all other tortfeasors are subject to the common law for the well-being of the persons they harm.

Chapter 538.230 creates a benefit which flows to malpracticing health care providers and their insurers with-

out any concomitant legislative purpose and, certainly, of absolutely no benefit to malpractice victims. It is a legislative re-apportionment of the judgment back to the malpractitioner, which critically violates the "principle of fairness" upon which our common law rule of joint and several liability is based. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co., supra,* at 468-69. According to the Court:

> The long history of the law of joint and concurrent tortfeasor liability and our jurisprudence is in fact a rich expositional refinement of the principle of fairness.

Id. at 468-69 n.4 (citing to J. Rawls, *A Theory of Justice* 348 [1971]) ("This premise is the basis of our fault-based system of tort liability").

Given the practical exigencies of handling these cases, it works a tremendous prejudice on malpractice victims that physicians and hospital defendants may apportion fault to released parties under Section 538.230.1. This Court recognizes that malpractice claims of any magnitude at all are rarely settled prior to the filing of a lawsuit and, once the lawsuit is filed, defense counsel and the insurance carriers invariably will not discuss settlement until plaintiffs' liability experts have been deposed.[29]

Thereafter, the basic unfairness of Section 538.230.1 emerges. The remaining defendants are permitted to use the deposition transcripts of Plaintiffs' identified expert

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[29] Indeed, that is precisely what occurred in the instant case. Following the depositions of all of Plaintiffs' anesthesiology physician experts, settlement discussions were initiated and resulted in the settlement agreement and release approved by the Court on September 27, 1990 (Legal File, p. 107.7). After all of the depositions of the surgical experts were completed, settlement talks were initiated and the surgeons and the surgical group settled with Plaintiffs, which was approved by the Court on February 1, 1991 (Legal File, 107.12.

witnesses to implicate the released physicians. As a matter of trial strategy, Plaintiff is severely hampered: her credibility is called into question if she now attacks her own expert whom she alone selected and identified. Furthermore, the released party and his or her counsel are not at trial in defense of their actions, and this results in a disproportionately high percentage finding of liability against the released party not present at trial to defend and against whom plaintiffs previously have identified expert witnesses.

Finally, the inescapable conclusion to any lay jury is that the released party has, indeed, settled with plaintiff. By carving out one isolated class of tortfeasors who may benefit from a special rule apportioning fault to released parties, the legislature is furthering no legitimate interest, other than to further line the pocketbook of wealthy health care providers and their insurance carriers.

In terms of any legislative objective to reduce the costs of malpractice litigation and encourage settlements, Section 538.230 creates precisely the opposite effect. Should this Court give constitutional credence to that section, it will virtually insure a sharp increase in both the number and complexity of malpractice actions. This comes about because a malpractice victim can obtain a judgment for one-hundred percent (100%) of her economic damages *only* by suing *and* proceeding to trial against every malpracticing party, including perhaps those the victim could have—albeit wanted to have—released.[30]

Not settling prior to or during trial would be the only way a malpractice plaintiff can assure that remaining defendants at trial would not "point the finger" at the "empty chair." It is difficult to find a legitimate legislative interest in a statutory scheme which promotes a

[30] As a practical matter, many severly injured plaintiffs, lacking money for required medical or rehabilitative services and unable to work, may be forced to settle with at least some defendants prior to trial.

greater number of malpractice trials with a greater degree of complexity and more litigation expenses and which results in fewer settlements.

Section 538.230 cannot pass Equal Protection challenge even under the "rational relationship" test because of the arbitrary and irrational scheme of discriminating against the class of tort victims brutalized by malpractice. It denies these persons the benefit of full compensation to which they would be entitled under our existing rules of joint and several liability.

4. Chapter 538 and Its Individual Provisions Violate Due Process of Law.

Section 10 of the Missouri Constitution, Article 1, Bill of Rights, provides:

> That no person shall be deprived of life, liberty or property *without due process of law.*

Missouri Constitution of 1945, Article I, Bill of Rights, Section 10 (Emphasis added). "Due process of law" in Missouri means that the individual safeguards applicable for the protection of the individual rights for one class of persons will govern precisely those rights and duties for persons which belong to that same class. *Ivie v. Bailey*, 5 S.W.2d 50, 54 (Mo. 1928). Due process requires that the law applies equally to *all* within a particular class and failing that, there is a violation of a citizen's fundamental constitutional rights. *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 903 (Mo.banc. 1950), *ovrld on other grnds, State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959).

Due process analysis has involved the judicial requirement of a *quid pro quo* or "reasonably just substitute."[31]

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[31] The genesis of *quid pro quo* constitutional analysis is the U.S. Supreme Court decision in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). Therein, the Court reviewed the constitutionality of a state workers' compensation law and found that the

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). The U.S. Supreme Court studied the Price-Anderson Act which put a $560 million ceiling on liability in nuclear power plant accidents in exchange for the imposition of strict liability and an expedited recovery scheme. *Id.* at 69. In upholding the Act under Equal Protection and Due Process grounds, the Court emphasized the significance of a substitute compensation scheme. *Id.* at 92-93. The Court also found it advantageous to plaintiffs that the Act contained a "waiver of defenses" which would effectively entitle "injured parties to compensation without proof of fault . . ." *Id.* at 91.

Applying a *quid pro quo* analysis in the context of the Due Process evaluation were the Supreme Courts of North Dakota, Texas, New Hampshire, and Illinois. Under this emerging doctrine of Due Process analysis, the Missouri medical malpractice legislation surely fails. No "reasonably just substitute" to injured malpractice victims exists to remotely compensate them for the drastic curtailment of their historical common law rights and remedies.[32]

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benefits created by the statute created a "reasonably just substitute" for the common law remedies. *Id.* at 201. In the Court's view:

> Nor is it necessary, for the purposes of the present case, to say that the State might, without violence to the constitutional guarantee of "due process of law," suddenly set aside all common-law rules respecting liability between employer and employee without providing a *reasonably just substitute* . . . It perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, *without setting up something adequate in their stead.*

Id. at 201 (Emphasis added).

[32] *Arneson v. Olson, supra* at 134-35; *Lucas v. United States, supra* at 690 ("our first concern with the statute is that the legislature has failed to provide Lucas any adequate substitute to obtain redress for his injuries"); *Carson v. Maurer, supra* at 837-38; *Wright v. Central DuPage Hospital Association, supra* at 328 ("defendants argue that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients

The Supreme Court of Missouri used a *quid pro quo* analysis in the course of invalidating the statutory limitation period in medical malpractice cases as applied to minors. *Strahler v. St. Luke's Hospital, supra,* at 12. This Court observed that the statute "arbitrarily and unreasonably denies them a set of rights *without providing any adequate substitute course of action to follow.*" *Id.* (Emphasis added). Exactly the same reasoning applies to the case at bar in that Appellant has been deprived of a number of rights without any substitute remedy whatsoever.

By the entry of the jury's verdict of February 28, 1991, Appellants had a lawful interest in the award of compensatory damages rendered by the verdict subject to the trial and appellate court's review. It is an unconstitutional "taking" to give back to the insurance carrier of the malpracticing physician the amount of non-economic damages exceeding the "cap" which were lawfully found by the jury and approved by the trial and appellate courts. This "taking" by the statute violates due process of law as Appellants had no rights or remedy with respect thereto. *Williamson v. Vardeman,* 674

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of medical care.' This *quid pro quo* does not extend to the seriously injured medical malpractice victim . . ."). *See generally* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties,* 18 Harv. J. Legis. 143 (1981).

Use of a *quo pro quo* analysis provided the justification for two (2) state supreme courts to uphold the constitutionality of their respective medical malpractice reform statutes. *Johnson v. St. Vincent Hospital, Inc.,* 404 N.E.2d 585, 601 (Ind. 1980); *Sibley v. Board of Supervisors of Louisiana State University,* 462 So.2d 149, 156, *opinion modified,* 477 So.2d 1094 (La. 1985). Both the Indiana and Louisiana schemes involved the creation of a Patient Compensation Fund and this was given great emphasis by each court. *Johnson v. St. Vincent Hospital, supra,* at 601 ("[t]he [Indiana] legislature responded by creating the Patient Compensation Fund); *Sibley v. Board of Supervisors fo Louisiana State University, supra,* at 156.

F.2d 1211, 1216 (W.D.Mo. 1982) (applying Missouri law).

* * * *

II. THE TRIAL COURT ERRED BY OVERRULING PLAINTIFFS' MOTION TO MODIFY JUDGMENT OR, ALTERNATIVELY, FOR NEW TRIAL BECAUSE THE JUDGMENT ENTRY OF MARCH 15, 1991 IS UNLAWFUL IN THAT THE CHALLENGED LEGISLATION VIOLATES SPECIFIC PROVISIONS OF THE UNITED STATES CONSTITUTION WHICH ARE (A) DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT, (B) EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, (C) RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT AND (D) THE SEPARATION OF POWERS CLAUSES

Due process of law under the United States Constitution means that a person has an opportunity to be heard at a meaningful time and in a meaningful manner. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The Fourteenth Amendment to the United States Constitution guarantees equal protection under the law and due process of law. That Amendment provides that:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Bill of Rights. There is some authority that the United States Supreme Court recognizes a constitutional right of access to the courts applicable to the state through the Fourteenth Amendment. *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971). In the cited case, the State of Connecticut sought to impose court fees to indigent persons seeking a divorce. The United States Supreme Court held that such court fees unconstitutionally denied such persons the right of access to the courts and are violative of due process. *Id.*

Appellants' right to Equal Protection and right to trial by jury under the U.S. Constitution also are violated by the challenged provisions of Chapter 538, as well as the federal Separation of Powers clauses. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall stated that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *One of the first duties of government is to afford that protection.*

(Emphasis added).

* * * *

V. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN ACCORDANCE WITH CHAPTER 538, V.A.M.S. GIVEN THE UNCONSTITUTIONALITY OF THOSE PROVISIONS UNDER THE MISSOURI AND FEDERAL CONSTITUTIONS

Plaintiffs submitted Jury Instructions to the trial court which disregarded Chapter 538, and which would have been the appropriate instructions had that medical malpractice legislation not been in effect (Legal File, pp. 112-28). The Court erred in refusing Plaintiffs' tendered instructions to the jury in this regard. *Orloff v. Fondaw*, 315 S.W.2d 430 (Mo.App. 1958). In those Jury Instructions, Plaintiffs *did not* include categorization of various damages, apportionment of fault between or among named defendants at trial, apportionment of fault between or among the named defendants at trial and any released non-parties, and did not include Verdict Directing Instructions against released parties Mestad, Powers and Binda.

To the contrary, over Plaintiffs' strenuous objections, the trial court accepted jury instructions which the Court directed Plaintiffs to prepare which were consistent with Chapter 538. These instructions, and each of them, should

have been refused because they were directly in contravention with each and every one of the provisions of the Missouri and United States Constitutions as set forth herein; defendants failed to timely supplement their pleadings to add affirmative defenses alleging fault of non-parties; and defendants failed to timely supplement their Answers to Interrogatories adding expert witnesses in support of their negligence claims against released parties Mestad, Powers and Binda. The trial court erred by instructing the jury on the fault of non-parties to the action and, notwithstanding the provisions of Chapter 538, it was error to do so.

* * * *

CONCLUSION

The majority of medical malpractice statutes across the country which have infringed upon the rights of victims of medical malpractice and have granted greater privileges to malpractice defendants have been stricken down as unconstitutional. Transcending all of the various constitutional bases for striking down these statutes are the notions of fundamental fairness and lack of equal footing. Nicole Adams and other severely injured victims like her should not be stripped of legal rights so that The Children's Mercy Hospital, Dr. Jelinek, and other malpracticing hospitals and physicians may escape full responsibility for their harmful mistakes. Our social order and common law system of civil justice must not succumb to transient whims of the majoritarian political process at the singular expense of the most tragically harmed victims.

WHEREFORE, for the above-stated reasons, Appellants Nicole and Julia Alice Adams respectfully request that the Supreme Court of Missouri enter its Order as follows:

(a) Invalidating the challenged provisions of Chapter 538, R.S.Mo., as unconstitutional under the Missouri and United States Constitutions;

(b) Remanding this action to the trial court for modification of and entry of Judgment in conformance with Missouri law; and

(c) For such other and further relief as requested herein as this Court deems just and proper.

Respectfully submitted,

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APPENDIX B

IN THE SUPREME COURT OF MISSOURI

Consolidated Case Nos.: 73867, 74139

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,

Appellants,

v.

THE CHILDREN'S MERCY HOSPITAL, et al,

Respondents.

[Duplicate of Filing on Jun. 3, 1992]

APPELLANTS' MOTION FOR REHEARING

COMES NOW Appellants, by and through their counsel of record, pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, and respectfully move for rehearing with the Court for all the reasons set forth below:

I. THE DECISION OF THE COURT HANDED DOWN ON MAY 19, 1992 DOES NOT ADDRESS THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY APPELLANTS

In setting forth the constitutional questions raised in the appeal by Nicole Adams and Julia Alice Adams, the Court sets forth only the nine (9) constitutional provisions of the Missouri Constitution. *Adams v. The Children's Mercy Hospital*, No. 73867, filed May 19, 1992, p. 4; (hereinafter "Adams Decision"). The only reference to Appellants' claim that the provisions of Chapter

538 violate the United States Constitution comes within the context of the Equal Protection Challenge (Adams Decision, p. 7), and a brief mention of the Seventh Amendment right to jury trial (p. 17). No other reference is made by the Court's decision to any of Appellants' contentions that the challenged legislation violates specific provisions of the United States Constitution expressly applicable to this Court under the provisions of the Fourteenth Amendment.

This Court has exclusive appellate jurisdiction within the State of Missouri "in all cases involving the construction of the Constitution of the United States . . ." Missouri Constitution of 1945, Art. V., 5, Sec. 3. This Court is bound to follow the provisions of the United States Constitution, especially the Fourteenth Amendment, and those decisions of the Supreme Court of the United States with respect thereto. Constitution of the United States, Art. VI; *Cooper v. Aaron*, 358 U.S. 1 (1958); *Laborers Educational and Political Club—Independent v. Danforth*, 561 S.W.2d 339, 348-49 (Mo.Banc. 1977); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo.Banc. 1972).

In addressing Appellants' argument that the challenged legislation violates trial by jury and due process provisions of the U.S. Constitution, Appellants respectfully urge that this Court's decision did not address these specific arguments. Appellants respectfully request clear guidance from the Court concerning these specific constitutional contentions which have been raised and argued in the briefs.

II. APPELLANTS DID RAISE THE ISSUE OF "PREJUDGMENT INTEREST" AT THE EARLIEST OPPORTUNITY IN ORDER TO PRESERVE THIS CONSTITUTIONAL CHALLENGE FOR APPELLATE REVIEW

In the Court's decision, the Court relied upon *Land Clearance For Redevelopment v. Kansas City*, 805 S.W.2d

173 (Mo.Banc. 1991), as substantial grounds for concluding that Appellants herein did not timely raise the issue of "prejudgment interest" at the trial court level. This Court specifically alluded to the reason given in *Land Clearance* for that decision because it "denied party opponents an opportunity to offer an evidentiary response . . ." (Adams's Decision, p. 19). In the case at bar, any prejudgment interest allowable would be assessed by the *trial court* and is not a subject of evidence to be considered by the *jury*. Accordingly, there was no conceivable basis by which Appellants herein could have denied respondents "an evidentiary response" in that the interest rate was not a matter to be litigated.

Furthermore, in Plaintiffs' Motion to Bar the Enforcement of Any and All Provisions of V.A.M.S., Chapter 538 filed prior to trial on February 5, 1991, Appellants herein specifically sought to bar any and *all* provisions of the challenged statute as null and void as directly violative of the Missouri and Federal Constitutions. There was no certainty that the jury's damages award would have exceeded the pre-trial settlement demand made by Appellants in accordance with Section 408.040(2), V.A.M.S. For these reasons, no conceivable prejudice could have occurred to respondents and, in addition, the all-inclusiveness of Plaintiffs' motion preserves the point.

III. THE RELIANCE OF THE COURT'S OPINION ON *DEMAY v. LIBERTY FOUNDRY CO.* AND *TULL v. UNITED STATES* MAY OVERLOOK THE CONSTITUTIONAL AND PROCEDURAL FRAMEWORK WITHIN WHICH EACH OF THESE CASES WAS DECIDED

One matter which, with all due respect, may have been overlooked by the Court's decision is an acceptance of respondents' flawed interpretation of *Demay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931) and the U.S. Supreme Court decision in *Tull v. United States*, 481

U.S. 412 (1987). The interpretation given to each of these decisions by respondents, which lifts each holding out of the proper constitutional context, may have inadvertently been utilized in this Court's decision.

The Missouri Supreme Court decided *DeMay v. Liberty Foundry Co., supra*, in the context of holding Missouri's Workers' Compensation scheme constitutional. *Id.* at 644-45. The statutory scheme replaced one system with rights and remedies while streamlining proof of fault and eliminating certain common law defenses. *Id.*

In holding the new statutory scheme constitutional, this Court repeatedly stressed that the Act was a *voluntary* and elective measure in that either an employer or employee may decide not to be bound by the provisions of the Act. *Id.* at 649. As pointed out by this Court:

> Either party to the contract of hiring may preserve his *right to trial by jury* by electing to stand upon the provisions of Section 1 of the Act.

Id. at 649 (Emphasis added). No such election is available to horribly injured victims of a physician's or hospital's malpractice. For this reason, Appellants herein respectfully urge this Court to reconsider the precedential value of *DeMay* in view of the above discussion.

Similarly, respondents and this Court's opinion relied upon the United States Supreme Court decision of *Tull v. United States, supra*, for the proposition that a citizen has no constitutional right to a jury's determination of damages. The United States Supreme Court itself distinguished *Tull* from the circumstances of the case at bar by pointing out the civil penalty at issue was more analogous to the type of 18th Century English action which did *not* require trial by jury. *Id.* at 420-21. Furthermore, the Court held that the civil penalty at issue "was the type of remedy at common law that could only be enforced in courts of law." *Id.* at 422. Thus, the precedential

value of *Tull v. United States*, *supra*, to the circumstances of the case at bar is nil.

The U.S. Supreme Court placed great emphasis upon the fact that the *party* bringing the action is the U.S. government, not a private citizen. *Tull* has no bearing on the right to trial by jury as between private civil litigants. *Id.* at 427 (holding limited to requirement of jury for *civil penalty* only). Indeed, the U.S. Supreme Court recently affirmed in the context of a civil trial that the assessment of the *amount* of punitive damages is uniquely, historically, and constitutionality a province of the jury. *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032 (1991).

IV. CONCLUSION

Appellants respectfully urge this Court to grant a rehearing for the reasons stated herein. Significant and material matters of law and fact, by a reading of the Court's opinion, do require re-examination and review. The importance of this issue not only to Appellants herein but to future generations of innocent victims of egregious medical malpractice requires nothing less.

WHEREFORE, for the above-stated reasons, Appellants herein respectfully request that this Court enter its Order sustaining this Motion for Rehearing for the reasons set forth herein and to grant such other and further relief as this Missouri Supreme Court deems just and proper and according to law.

Respectfully submitted,

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APPENDIX C

IN THE SUPREME COURT OF MISSOURI

Consolidated Case Nos. 73867, 74139

NICOLE ADAMS, a minor child, by and through her legal guardian next friend JULIA ALICE ADAMS, and JULIA ALICE ADAMS, individual,

Appellants,

v.

CHILDREN'S MERCY HOSPITAL, *et al.*,

Respondents.

RESPONDENT CHILDREN'S MERCY HOSPITAL'S SUGGESTIONS IN OPPOSITION TO APPELLANTS' MOTION FOR REHEARING

COMES NOW, Respondent the Children's Mercy Hospital, by and through its counsel of record, pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, and respectfully offers the following suggestions in opposition to Appellants' motion for rehearing by this Court:

I. THIS COURT'S MAY 19, 1992, DECISION ANSWERS THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY THE APPELLANTS.

Appellants argue that this Court made no reference in its May 19 opinion in this case to appellants' claim that the provisions of Chapter 538 violate the trial by jury and due process provisions of the United States Constitution.

The appellants' argument fails for several reasons: First, the rationale this Court used in finding that Chapter 538 does not violate the trial by jury or due process

provisions of the Missouri Constitution is the same analysis that applies to the United States Constitution. Therefore, the decision necessarily means that the federal Constitution has not been violated.

Secondly, the provisions of the Missouri Constitution have consistently been interpreted more narrowly than the corresponding provisions in the United States Constitution. All but one of the federal courts that have considered the issue of the constitutionality of similar legislation have found such legislation to be constitutional under the United States Constitution. *See Franklin v. Mazda Motor Corp.*, F. Supp. 1325 (D. Md. 1989); 704 *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); and *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989).

Furthermore, as this Court noted in its opinion, there is no substantive right under the common law to a jury determination of damages under the Seventh Amendment. The assessment of a civil penalty is not one of the 'fundamental elements' preserved by the common law right to a jury trial." *Adams v. The Children's Mercy Hospital*, Slip op. 738767 at pg. 17. This statement clearly recognizes that the Seventh Amendment is not violated by Chapter 538. Consequently, appellants' point as to the trial by jury right is especially misplaced.

Finally, respondent respectfully suggests that, should this Court find any merit to appellants' argument, this Court could rectify any misconceptions by a simple addition to the opinion. Rehearing is not required or justified by the facts before this Court.

II. APPELLANTS' ATTEMPT TO REARGUE ISSUES IS IMPROPER AND SHOULD BE IGNORED.

A. Appellants Did Not Raise The Issue Of "Prejudgment Interest" At The Earliest Opportunity.

Respondent's brief clearly raised and fully presented the appellants' untimely raising of several constitutional issues. (Respondent Children's Mercy Hospital Brief at 11-13). Appellants then had the opportunity to reply to those issues in their response brief. They further had the opportunity to present argument to this Court about this issue. Indeed, appellants availed themselves fully of the opportunity to discuss the issue of their untimely raising of certain constitutional complaints in their Reply Brief. (Appellants' Reply Brief at 21-25).

Rule 84.17 provides that the purpose of a motion for rehearing is to "call attention to material matters of law or fact overlooked or misinterpreted by the Court as shown by its opinion. *Reargument of issues determined by the opinion will be disregarded.*" (emphasis added). *See also Paskon v. Salem Memorial Hospital*, 806 S.W.2d 417 (Mo. Ct. App. 1991). Appellants are now attempting to reargue an issue that was clearly determined by this Court. Appellants' reargument should be disregarded.

B. This Courts' Opinion Does Not Overlook Any Constitutional Or Procedural Issues.

Appellants argue that this Court's decision is based on a flawed interpretation of *DeMay v. Liberty Foundry Company*, 37 S.W.2d 640 (Mo. 1931) and *Tull v. United States*, 418 U.S. 412 (1987). Again, the appellants are merely rearguing issues that they have already presented to this Court. Appellants' contention that the *Demay* case is not applicable because it addressed the statutory workmens' compensation scheme as a voluntary measure was argued in the Appellants Reply Brief filed with this

Court on December 27, 1991. (Appellants' Reply Brief at 12-14).

Appellants also briefed this Court on any "misperception" about the *Tull* case in their Response Brief. (Appellants' Reply Brief at 17-18). Appellants' attempted reargument should be ignored by this Court and this Court's well-reasoned decision in this case should stand as filed.

CONCLUSION

Respondent respectfully suggests that this Court's original opinion in this case is proper and that no sound basis for granting Appellants' request for rehearing exists.

WHEREFORE, for all the foregoing reasons, Respondent Children's Mercy Hospital respectfully suggests that this Court enter its Order overruling Appellants' Motion for Rehearing.

Respectfully submitted,

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APPENDIX D

IN THE SUPREME COURT OF MISSOURI

Case Nos. 73867 & 74139

NICOLE ADAMS, A Minor Child, By and Through
Her Legal Guardian and Next Friend,
JULIA ALICE ADAMS, and
JULIA ALICE ADAMS, Individually,
Appellant,

v.

JANE JELINEK-BOOZALIS,
Cross-Appellant,

v.

THE CHILDREN'S MERCY HOSPITAL,
Respondents.

Appeal from the Circuit Court of Jackson County,
Missouri, Sixteenth Judicial Circuit, Division No. 6
Honorable John R. O'Malley, Judge and Consolidation
with Transfer from the Missouri Court of Appeals
for the Western District, W.D. No. 44857

RESPONDENT CHILDREN'S MERCY HOSPITAL
BRIEF

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* * * *

The United States Supreme Court has held that there is no vested interest in any rule at common law.

> The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Company v. Envtl. Study Grp., Inc., 57 L. Ed. 2d 595 (1978); *Tull v. United States*, 95 L. Ed. 2d 365 (1987).

* * * *

This Court has identified suspect classifications as "those based on race, religion or similar considerations." *Harrell* at 63, citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, (1976), wherein the Supreme Court said: "a suspect class is 'one saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Massachusetts Board* at 313.

Fundamental rights in Missouri include the right to free speech, to vote, to travel interstate, and to personal privacy. *Mahoney* at 512.

The equal protection guarantee is directed at "invidious discrimination." When neither a fundamental right is infringed nor suspect class created, the equal protection safeguard is only offended when a classification rests on grounds "wholly irrelevant to the achievement of the state's objective." *Id.* Indeed the state is not required to prove the "correctness" of a legislative decision. The state legislature is presumed to have acted within the constitutional confines even if, "in practice, their laws result in some unequality." *Id., citing McGowan v. Maryland*, 366 U.S. 420, 425 (1961), and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 464.

* * * *

B. A Reasonable Basis for the Missouri Legislature's Enactment of Chapter 538 Existed in 1986 and Still Exists Today.

The first principle of any equal protection inquiry is that a "duly enacted statute is presumed to be constitutional." *Mahoney* at 512. While parties asserting an equal protection challenge may introduce evidence supporting their claim that the legislative enactment is irrational, they *cannot* prevail if "it is evident . . . *that the question is at least debatable.*" *United States v. Caroline Products Co.*, 304 U.S. 144, 154 (1938); *Mahoney* at 513.

Missouri is not required to convince this Court of the correctness of its legislative judgment in enacting Chapter 538. Rather, the burden is on the plaintiffs to convince this Court that the legislative facts upon which Chapter 538's classification was "apparently based *could not reasonably be conceived to be true by the governmental decisionmaker.*" *Mahoney* at 512, citing *Minnesota Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed.2d 659 (1981); *Vance v. Bradley*, 440 U.S. 93, 111, 59 L.

Ed.2d 171, 184-85 (1979) (Emphasis added). Plaintiffs have not met this heavy burden.

* * * *

The United States Supreme Court has found that a statutory limitation on recovery "is a classic example of an economic regulation—a legislative effort to structure and accommodate the burdens and benefits of economic life.'" *Duke Power Company v. Environmental Study Group, Inc.*, 57 L.Ed.2d 595 (1978).

* * * *

Furthermore, United States Supreme Court guidance in determining "quasi-fundamental rights" or "semi-suspect" classes shows that "the right to recover for personal injuries" is not an appropriate class for heightened scrutiny. The United States Supreme Court has only applied heightened scrutiny in cases of illegitimacy, *Clark v. Jeter*, 108 S. Ct. 1910 (1988); gender, *Craig v. Boren*, 429 U.S. 190 (1976) and alienage, *Plyles v. Doe*, 457 U.S. 202 (1982). In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1977) the United States Supreme Court used the rational basis test in analyzing and upholding a federal law limiting the damages recoverable from a nuclear plant operation in the event of a nuclear accident. *Duke Power* at 93.

* * * *

XI. THE TRIAL COURT DID NOT ERR WHEREIN IT OVERRULED PLAINTIFFS' MOTION TO MODIFY JUDGMENT, OR ALTERNATIVELY, FOR NEW TRIAL BECAUSE CHAPTER 538 DOES NOT VIOLATE ANY OF THE PROVISIONS OF THE MISSOURI OR UNITED STATES CONSTITUTIONS IN THAT CHAPTER 538 WITHSTANDS CHALLENGES ON DUE PROCESS, EQUAL PROTECTION, RIGHT TO TRIAL BY JURY AND SEPARATION OF POWERS GROUNDS.

Defendant has previously discussed in detail why Chapter 538 does not offend any aspect of the Missouri Constitution. Plaintiffs' assertion that Chapter 538 violates the United States Constitution is equally without merit. A cursory reading of plaintiffs' second point relied on reveals that plaintiffs could not find even one federal case to support their claim.

As previously discussed, all of the federal courts that have considered the constitutionality of reform acts have upheld such acts as constitutional. *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986). In fact, the *Boyd* court upheld a *total* recovery cap which was much more onerous than Missouri's noneconomic cap.

Under the analysis of those cases and the foregoing points of this brief, Chapter 538 does not violate any provision of the United States Constitution.

APPENDIX E

IN THE SUPREME COURT OF MISSOURI

No. 73867

NICOLE ADAMS, a Minor Child, by and through her Legal Guardian and Next Friend, Julie Alice Adams, and JULIA ALICE ADAMS, Individually,
Appellants/Plaintiffs

vs.

THE CHILDREN'S MERCY HOSPITAL,
Respondent
and

JANE JELINEK, M.D.,
Respondent/Cross-Appellant

Appeal from the Circuit Court of Jackson County
HONORABLE JOHN R. O'MALLEY, Judge
Division No. 6

RESPONDENT/CROSS-APPELLANT
JANE JELINEK, M.D.'s RESPONDENT: BRIEF

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* * * *

XII. CHAPTER 538 DOES NOT VIOLATE THE DUE PROCESS, EQUAL PROTECTION, RIGHT TO TRIAL BY JURY AND SEPARATION OF POWERS CLAUSES OF THE UNITED STATES CONSTITUTION.

This defendant has demonstrated, in arguments set forth above, that Chapter 538 does not violate the due process, equal protection, right to trial by jury and separation of powers clauses of the Missouri Constitution. Much, if not all, of those arguments are equally applicable to plaintiffs' constitutional challenges under the United States Constitution. For the reasons set forth above, plaintiffs' challenges under the United States Constitution are without merit.

It should be noted that the plaintiffs fail to cite a single federal court case in support of their constitutional challenge under the United States Constitution. The plaintiffs cite *Bodie v. Connecticut*, 401 U.S. 371 (1971). However, this defendant has previously discussed this case and subsequent decisions, which actually support the upholding of Chapter 538 in the face of constitutional challenge. *See, supra*, pp. 27-30. In fact, federal courts have routinely upheld legislation similar to Chapter 538 in the face of constitutional attacks. *Franklin v. Mazda Motor Corp.*, 705 F. Supp. 1325 (D. Md. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Davis v. Omitowogau*, 883 F.2d 1155 (3rd Cir. 1989). Pursuant to the reasoning set forth in these federal cases and the arguments set forth above in response to plaintiffs' constitutional challenges under the Missouri Constitution, it is clear that Chaper 538 does not violate any provision of the United States Constitution.

* * * *

APPENDIX F

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV89-23626
Division 6
Civil Docket "M"

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,

Plaintiffs,

v.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,

Defendants.

SUGGESTIONS OF DEFENDANTS CHILDREN'S MERCY HOSPITAL, CINDY DOOLEY, R.N. AND SUSAN ROUSHAR, R.N. IN OPPOSITION TO PLAINTIFFS' MOTION TO BAR ENFORCEMENT OF CHAPTER 538, V.A.M.S.

COME NOW defendants, the Children's Mercy Hospital, Susan Roushar, R.N. and Cindy Dooley, R.N., by and through their attorneys, and offer the following suggestions in opposition to plaintiffs' motion to bar enforcement of Chapter 538, V.A.M.S.:

I. *FACTUAL BACKGROUND*

Plaintiffs' medical malpractice cause of action is set for trial in this court on February 11, 1991. This cause of action arose as a result of incidents occurring on March

30, 1988. Plaintiffs' medical malpractice action alleges improper health care. Therefore it is subject to Chapter 538, V.A.M.S., which applies to all such claims accruing on or after February 3, 1986.

On February 6, defendant received plaintiffs' motion to bar the enforcement of Chapter 538 at the trial. Defendants respectfully request that this Court enforce Chapter 538 in its entirety because it is constitutional under both the Missouri and United States Constitutions. Furthermore, plaintiffs' claim is not justiciable at this time because it is not ripe.

* * * *

The United States Supreme Court has said:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Company v. Envtl. Study Grp., Inc., 57 L. Ed.2d 595 (1978); *Tull v. United States*, 95 L. Ed.2d 365 (1987).

* * * *

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989), upheld the constitutionality of a statutory cap in medical malpractice actions despite plaintiffs' assertion of both state and federal constitutional issues. The federal court found the state issues to be controlled by *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989), which upheld the constitutionality of the cap on all grounds.

In considering the validity of the cap under the federal Constitution the court held that it was not the jury's role to determine the legal consequences of its factual

findings. The court found that "once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; *it may not also mandate compensation as a mater of law.*" *Id.* at 1196 (emphasis added). It also noted that the United States Supreme Court had recently suggested that the right to a jury trial might not even extend to the "remedy phase of a civil trial." *Tull v. United States*, 95 L. Ed.2d 365 (1987).

* * * *

The United States Supreme Court has found that a statutory limitation on recovery "is a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'" *Duke Power Company v. Environmental Study Group, Inc.*, 57 L. Ed.2d 595 (1978).

* * * *

VI. *SUMMARY*

Within the entire body of plaintiffs' motion, not one case can be found to support the numerous constitutional attacks which plaintiffs assert. The few cases plaintiffs do cite are either overruled or distinguishable. On the other hand, defendant has cited this Court to numerous state and federal cases specifically addressing the challenges which plaintiff has lodged. Chapter 538 does not violate plaintiff's right of access to the courts, right to a jury trial, right to equal protection or to due process of law. In addition, plaintiffs' claims are not ripe.

WHEREFORE, for the above stated reasons, defendants Children's Mercy Hospital, Susan Roushar, R.N. and Cindy Dooley, R.N., respectfully request this Court to overrule plaintiffs' motion.

Respectfully submitted,

/s/ Timothy M. Aylward
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